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No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

MORRIS LAVINE,

620 Bartlett Building, Los Angeles 14,

Attorney for Appellants.

FILED
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PAUL P. O'BRIEN,
CLERK

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No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

*To the Honorable Chief Judge William Denman, and to
the Honorable Associate Judges of the United States
Court of Appeals for the Ninth Circuit:*

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 225, U. S. Code (1946), and by the New Judicial Code, Title 28, Section 1254(1), and by the Emergency Price Control Act of 1942, and Regulations thereunder and the Emergency Price Control Act of 1942, as amended, Title 50 App., Section 925.

Constitutional provisions, statutes and regulations involved are in the Appendix.

Short Statement of the Facts.

On March 11, 1946, a grand jury, sitting in the Southern District of California, returned an indictment, No. 18366, against the appellants and the Southern California Meat Company, Inc., and Charles M. King, charging alleged violations "under the Emergency Price Control Act of 1942 and Maximum Price Regulations No. 148, 165, 169 and 239 thereunder."

The Grand Jury alleged:

"The Grand Jurors of the United States of America, being duly impanelled, sworn and charged in the District Court for the Southern District of California, Central Division, in the September, 1945, Term of this Court, having begun but not finished during the said September Term of Court, among other things the matter of the investigations charged in this indictment, and having continued to sit by order of this Court in and for the said District during the February, 1945, Term to complete inquiries begun, but not finished, at the original term, and inquiring for that District, upon their oaths find and present as follows:" [R. 2-3.]

Two and three grand juries sit during a term in Los Angeles. At the outset of the case, objection was made to the jurisdiction of the Court to proceed under the indictment because the grand jury indictment showed no jurisdiction in the grand jury, the date therein being faulty. The objection to the indictment was considered on its merits and denied by the Court. [R. 86, 87.]

Count One of the indictment charged a conspiracy under the "Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 165, 169 and 239 there-

under.” [R. 3.] The alleged conspiracy was to charges for slaughtering services, alleged overcharges and alleged false entries on the records and alleged acts in relation to each of these matters. It will be noted that the allegations related to the Emergency Price Control Act of 1942 and Maximum Price Regulations thereunder, and not to the Statute, *as amended*, nor to any *Revised* Maximum Price Regulations under the amended statute. [R. 3-6.]

In furtherance of the alleged conspiracy, to effectuate its purposes, overt acts a. to r. are alleged. These relate to a charge for slaughtering services, and to the issuance of certain invoices and to the receipt of certain sums of money from H. N. Sample.

H. N. Sample never testified and no evidence was presented on the matter of the receipt of any moneys for slaughtering services, nor in proof of a single overt act alleged in the conspiracy charge in furtherance of the alleged conspiracy or to effectuate its objects.

While fifty counts were charged in the indictment, twenty-seven were withdrawn and statements made that no proof would be offered on them.

Counts 2, 3, 4, 5, 6, 45, 46, 47, 48, 49 and 50 alleged over-charges under the Emergency Price Control Act and Regulations thereunder. The only persons who testified to alleged overcharges were dealers in meat who said that they paid side money and could not specify with particularity how much they paid on any particular purchase, and who themselves in some instances said they passed the amounts paid on to the customer and were themselves not being prosecuted.

Counts 12, 13, 32, 37, 38, 39, 40, 41, 42, 43, and 44 charged the making of false entry on a document *required*

by the Act or Regulations to be kept by the seller. Of these counts, counts 12, 13, 37, 40, 41, 42, 43 and 44 charged false entry on an invoice; count 32 on a ledger, and counts 38 and 39 on a statement. There was no evidence whatever presented that these were records being kept under the requirements of the Act, or that other records were not kept accurately as required by the Act; nor did the Court instruct the jury that invoices, ledgers or statements were within the regulation or statute, as documents required to be kept; nor was there any evidence as to just what was required under the statute or regulation.

The Emergency Price Control Act of 1942 was passed in 1942 (56 Stat. 23), and Maximum Price Regulation 169, which relates to beef and veal carcasses was issued in July of 1942. This did not fix any particular price but froze the prices of meat pursuant to the highest prices charged by particular dealers themselves in a given base period in March of 1941 at its highest level.

This indictment charged a violation of this Regulation under the then existing statute. The Regulation itself was revised several times and finally it was repealed by the Administrator himself in December of 1942. The statute also was amended several times. In October of 1942, the Emergency Price Control Act was first amended by the Inflation Control Act of October 2, 1942 (56 Stat. 765, c. 578). On June 30, 1943, the Emergency Price Control Act of 1942 was amended by Congress and extended for a year. It was thereafter known as the Emergency Price Control Act of 1942, *as amended*. Both Congress and the Administrator referred to it as such. New regulations were issued under it and were called Revised

Maximum Price Regulations. There were at least seventy revisions of the Regulation up to the time of trial.¹

The trial nevertheless continued into July of 1946. Objection, made to the jurisdiction of the Court to proceed was overruled, and on July 2nd, the Court permitted the jury to return a verdict and on July 5, 1946, the Court pronounced judgment, over objection that it was without jurisdiction to do so by reason of the termination of both statute and regulations.

The case was tried on the charge that the statute alleged was the Emergency Price Control Act of 1942, but the Court instructed the jury under the act both with and without the provisions of the act "as amended." It gave instructions on Revised Regulations thereunder—not on the specific allegations in the indictment which only referred to the "Emergency Price Control Act of 1942" and "the Maximum Price Regulation *thereunder*."

William Muehlberger testified to buying meat from Hyman Stillman in 1944 [R. 88] and paying five cents over [R. 90] at a time subsequent to the delivery of the meat. [R. 99.] He kept no record nor was he ever cited for prosecution by the O. P. A. [R. 103.]

¹By April 16, 1946, 11 F. R. 4156, there had been a seventieth revision or amendment to the regulations issued subsequent to the *Revised* Regulation of December 16, 1942.

All of these Regulations refer to the Emergency Price Control Act of 1942, *as amended* and to the Regulations as "revised." We assume these were not idle or unnecessary words.

On June 30, 1946, all Emergency Price Control Statutes as amended and all Regulations and revised Regulations terminated by the failure of Congress to re-enact. The Price Control Extension Act of 1946 specifically exempted meat from its operation. Congress repeatedly referred to the prior statutes as "amended."

Aside from these two purchases, not a single other person testified to having made any purchases from Mr. Stillman at any over-ceiling prices.

The other witnesses testified to making purchases from Mr. Segal.

No corroboration, no confession or other competent evidence was introduced to tie up Mr. Stillman with these specific transactions.

A purported statement given to Internal Revenue Agents from Mr. Segal and offered in support of the Government's case was to the effect that Mr. Stillman knew nothing about the transactions and did not participate in them, and the moneys which he, Mr. Segal, collected.

In support of the alleged false entry counts the Government offered no evidence whatsoever to show that books and records were kept by the defendants for the purposes of the regulations or show that there were no other books and records kept for the purposes of the regulations. The Government introduced invoices given to customers but these were not shown to be the documents required by the act or regulation to be kept by the seller, nor was there any showing as to who made out the particular invoice, nor was there any foundation laid for a proper introduction into evidence. Motions to strike were denied. [R. 304.]

There was also a ledger book introduced into evidence over objections that it was hearsay, and incompetent and without foundation. [R. 297-299.] This book contained the type of entries which it is apparent the regulations were not designed to have the seller of products keep under the regulation, and the ledger was not such a book as required to be kept. Nor was there any foundation

laid for the entry of the book; it was not shown to have been kept in the due and regular course of business, nor that it was a record ordinarily kept, and it was not shown that it was an accurate record of the matters ordinarily kept in the course of business. (Title 28, Sec. 695, U. S. C.)

In one ledger there was a change made on the ledger, because a co-partner stated that it was *not* kept in the regular course of business. The entry made in the accountant's office was not an entry customarily made in the due course of business. No foundation for proof of its contents as required by Title 28, Section 695, U. S. Code, was laid.

The Court also admitted in evidence a *statement* to a customer. (Counts 38 and 39.) These ordinarily are not kept by the seller. They were prepared for and given to the buyer as a statement of the sum due. There was no evidence that these were records required to be kept by the statute and regulations.

During the course of the trial, over objections of the defendant, the Court admitted the testimony of one Samuel Namson regarding Exhibits 10, 11, 39a, b and c, and refused to strike the same on the ground that it was *irrelevant* to any of the issues in the case and that it was without foundation. Namson was an accountant representing a co-partner. He was trying to have ledger entries reflect a profit instead of a loss.

The Court also admitted, over objection, the typewritten income tax return of each of the appellants. These were objected to as being without foundation and as incompetent. They were also objected to as in violation of the constitutional and statutory rights of the appellants and

as invading the appellant's rights under the Fifth Amendment to the Constitution of the United States.

The Court also admitted a *statement* to Internal Revenue Agents of the appellant Segal as counter-distinguished from the return of the defendant Segal. It was general in its nature, related to no particular transaction. This was a statement taken long after the conclusion of the transactions on which the appellant Segal was attempting to make a voluntary disclosure to the Bureau of Internal Revenue. Title 26, Section 55J makes such *statements* confidential and does not permit *statements* to be made public.

The use of the statement was also objected to as violating the Constitutional rights of the appellants under the Fifth Amendment to the Constitution of the United States. The Court overruled the objection.

One of the income tax statements admitted in evidence, that of Lou Segal, was not only typewritten but was prepared by an income tax man named Efron. It merely shows a signature, purporting to be a signature of a Lou A. Segal. No evidence was offered to show that the Lou A. Segal was the Lou A. Segal on trial.

The data contained in the statement is all typewritten. The income tax statement purporting to be signed by Hyman Stillman is also a typewritten return. Both returns were admitted in evidence over the objections of the appellants, and motions to strike were denied.

These statements and the returns were entirely hearsay and incompetent to prove their contents and were hearsay and clearly inadmissible.

In spite of the fact that the indictment charged violation of the "Emergency Price Regulation of 1942 and Maximum Price Regulation 169 thereunder" no particu-

lar price was alleged in the indictment constituting an alleged violation. The Court declined on motion at the outset of the trial to give the appellants a bill of particulars specifying the Regulation as well as the claimed statutory provisions which the appellants were accused of violating or the price which allegedly was in violation. There were at least seventy revised regulations under the amended statutes.

The Court instructed the jury alternately both under the old statute and the new. It gave prices as though the indictment charged the statute as amended and under revised regulations, which were inapplicable to the statute as it existed. In various charges to the jury, the Court erroneously said the prices referred to were under the Emergency Price Control Act of 1942, *as amended*, and (Revised) Regulations thereunder. [R. 355, 361, 362, 369.]

The Court also instructed the jury that termination of the statute as well as the regulations could not affect the prosecution.

It also failed to tell the jury that Exhibit 39(a) (b), and (c) which were withdrawn in the absence of the jury by the Government after the exhibits had been admitted in evidence, had been withdrawn and stricken. Motions to strike this evidence commenced at page 310. They were made in the absence of the jury. At page 321, the Government said it was withdrawing these exhibits. However, when the jury returned the Court did not inform them then nor in its instructions, nor at any time to disregard this particular evidence which was withdrawn in its absence. It was highly prejudicial. The incompetent and improper evidence remained for the jury's consideration.

Summary of the Argument.

I.

The indictment on its face shows that it is void for want of jurisdiction. The jurisdictional statement of the Grand Jury in the indictment as authority for the Grand Jury's existence shows that it was without legal authority to act. The entire proceedings were, therefore, null and void because of the invalidity of the indictment.

II.

The indictment was brought under the Emergency Price Control Act of 1942 (56 Stat. 23, ch. 26) and the Regulations issued thereunder. 7 F. R. 4653. The Emergency Price Control Act of 1942 was adopted January 30, 1942 (56 Stats. 23, ch. 26), it was amended by the Inflation Control Act of October 2, 1942 (56 Stats. 765, ch. 578), and thereafter was referred to not as "The Emergency Price Control Act of 1942" but as the "Emergency Price Control Act of 1942, *as amended*." It was amended June 30, 1943, the Stabilization Act of 1944, followed it.

Maximum Price Regulation 169, which was issued under the Emergency Price Control Act of 1942 did not set any dollars and cents price for the maximum prices, but froze meat prices at the highest prices charged by the meat dealers themselves between certain specific dates, to-wit: March 16 to March 28, 1942.

(See Maximum Price Regulation, 7 Fed. Register 4653, 4798.)

Thereafter the Maximum Price Regulation 169 was repeatedly amended. On December 12, 1942, the Administrator revoked Maximum Price Regulation 169 as issued under the Emergency Price Control Act of 1942 (7 Fed.

Register 10381). Thereafter, he issued Revised Maximum Price Regulations based upon new questions and different methods of fixing prices.

The Emergency Price Control Act of 1942 was thereafter amended again in 1943 and 1944. And, in 1944 the Act was called the Stabilization Act of 1944.

Maximum Price Regulation 169 had ceased to exist, having been fully revoked prior to any of the alleged acts charged hereunder and the statute had been and was changed prior to any of the acts charged hereunder, and the statutes relating to the Emergency Price Controls were out of existence at the time judgment was pronounced in this case.

The attempt to pronounce judgment after the termination of the statute, as well as regulations, was a nullity. The court was without jurisdiction to proceed.

The Maximum Price Regulation under the Emergency Price Control Act of 1942 had been out of existence for more than three and one-half years at the time the judgment was pronounced and the statute itself was out of existence as well, and had been amended several times.

The judgments were therefore null and void and judgments should have been arrested because of the repeal of both the Regulations and the termination of the Statute.

The attempt to sustain the case on the theory of the statute *as amended* and under regulations as repeatedly revised subsequent thereto was without due process of law guaranteed by the Fifth Amendment and a nullity.

III.

The verdicts were contrary to the law and the evidence.

(a) There was no proof of any conspiracy to violate the Emergency Price Control Act of 1942, which had expired and under which there were no existing regulations.

(b) There was no proof of any conspiracy or unlawful agreement. No proof of a single civil act alleged in furtherance of such agreement. There was no substantial proof of any substantive offenses as charged in the indictment.

(c) Men do not become conspirators because they are partners in business. The acceptance of any moneys as gifts or gratuities by one did not constitute a conspiracy on the part of another because he was a business partner.

(d) The evidence is wholly lacking as against each of the defendants regarding transactions alleged with the other defendant. Only two transactions relate to Stillman. All the others relate only to Segal.

The evidence is entirely silent that any invoices, books, records or other exhibits were being kept pursuant to any other statute or regulations or that they were false records kept for other purposes. There was no proof either defendant made or caused these records to be made.

The statute and regulations are vague and indefinite as to what records should be kept.

IV.

The District Court erred in the admission and exclusion of evidence in the case. There was no foundation for the books, records or invoices. Also they were clearly hearsay.

The District Court also erred in the admission into evidence of a book of records examined by a witness named Samuel Namson. It was not shown that the book and record was a book regularly used in the course of business or that it reflected the records of the business truthfully, or at a time at or near the transaction. In fact, it was the Government's evidence that the book entry was not made at or near the transaction and that it was not kept in the regular course of business. Therefore, it was error to admit this testimony.

V.

The District Court erred in the admission of testimony of invoices received of various witnesses without a proper foundation that they were a true and accurate copy of the invoices of the transactions and accurately reflected the facts therein set out, or that they were records kept to reflect OPA prices.

VI.

The District Court erred in admitting statements taken by Revenue Agents to be placed in evidence where those *statements* were not returns and were taken separate and apart from income tax returns and were made under the compulsion of the Internal Revenue Code.

Such statements about returns are not public records, and the federal agents who disclosed the same are liable to punishment. It is only income tax *returns* issued pursuant to the authority of the President and the Secretary of the Treasury that are made *public records* and are only such when requested under proper authority, and for uses authorized by statute.

There is no authority to use these returns in prosecutions of offenses not related to the Internal Revenue. *Statements* likewise are not returns and are not permitted to be disclosed.

Such statements are given under compulsion of law and therefore inherently and as construed and applied by the trial court, Title 26, Section 55, U. S. Codes, if construed to give that power and authority is in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The District Court, over objections, admitted the statements of federal revenue agents, which constituted compelled testimony—the use of which is forbidden by the Fourth and Fifth Amendments to the Constitution of the United States.

VII.

The trial court overruled the Motion to Dismiss the Indictment on the ground it was indefinite and uncertain and violated the Sixth Amendment to the Constitution of the United States in failing to set forth the nature and cause of the accusations and facts sufficient for the defendants to be prepared to meet their defense.

In this respect the District Court also denied a Bill of Particulars requesting the specific statute and regulation and the specific acts which appellants were charged with violating.

In this respect, it is contended that the trial court erred as well as violated the defendant's constitutional rights under the Sixth Amendment to the Constitution of the United States.

VIII.

The District Court also erred in holding that it had jurisdiction to pronounce judgment after the statute had expired and the regulation thereunder had been repealed and ended.

IX.

In the cross-examination of certain witnesses, the District Court restricted the examination unduly.

X.

The District Court Judge, in charging the jury, told the jury that he instructed them under the Emergency Price Control Act of 1942. Then he told them it was under the Emergency Price Control Act *as amended*, not under the Emergency Price Control Act of 1942 as charged in the indictment without amendment. He told the jury that the Maximum Price Regulations were as he gave them in his instruction, contrary to the express allegations of the indictment that the charge was a violation of the Emergency Price Control Act of 1942 and the Maximum Price Regulations thereunder which contained no specific prices and which were non-existent under the Emergency Price Control Act of 1942.

Thus the trial court, by his instruction, attempted to amend the indictment and to instruct the jury to consider the charge differently from the express allegations of the indictment.

XI.

The District Court erred in refusing an instruction as to gifts.

XII.

The District Court erred.

Specification of Errors.

Questions presented by this appeal:

I.

The indictment was void because it alleged on its face that it was not brought by a legally constituted and then existing Grand Jury.

The District Court erred in not dismissing the indictment and in not quashing the same.

The solemn declaration of the Grand Jury, in its indictment, cannot be amended or altered, and a trial on an illegal indictment is a nullity.

II.

The regulations alleged to have been violated had been revoked and the statute under which the regulations were allegedly promulgated were terminated prior to the alleged offense in the indictment. The defendants were, therefore, tried on a charge not made and without any existing statutes or regulations. The trial and the judgment were therefore both a nullity and violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

All the statutes and regulations relating to meat had terminated prior to the close of the prosecution. The proceedings thereafter were a nullity.

III.

The District Court erred in denying a Bill of Particulars as to the particular statute and regulation allegedly violated where the indictment alleged one statute and regulation and the government was going to proceed on another statute and revised regulation. Such a Bill of Par-

particulars would have enabled the defendant to know at the outset of the case what he had to meet and that the prices thus set out were not prices within the Emergency Price Control Act of 1942, and the maximum price regulation thereunder, which at that time was a price that had been fixed by the dealer at a base period and frozen; nor one fixed by the OPA.

IV.

The evidence was entirely insufficient to justify the verdicts. The verdicts were contrary to the law and the evidence. There was no evidence that the appellants had violated the Emergency Price Control Act of 1942, or any regulations issued thereunder, these having terminated long before.

There was no independent proof of any conspiracy between the defendants.

Only one witness testified; and only to two acts of Stillman. All the rest related solely to Segal.

There was no proof that any books, records or papers were being kept for the purposes of the statute, or that others were not correctly kept.

V.

The District Court erred in the admission and exclusion of evidence in the case. The District Court, over objection, admitted the typewritten income tax returns, allegedly those of the appellants, to be offered in evidence without foundation or proof of its contents. Segal's return was prepared by Jack Effron. There was no proof as to its correctness. It was hearsay, and incompetent. And in ad-

dition to the income tax return, the Court admitted in evidence the testimony of Donald Oliver Bircher regarding an alleged voluntary statement of appellant Segal to the Bureau of Internal Revenue. Statutes forbid the disclosure of any *statement* made to Internal Revenue agents, as distinguished from *returns* themselves. Both the statements and returns were too vague and general and related to no particular transaction charged in the indictment. They should not have been admitted.

VI.

The District Court erred in holding that Title 26, Section 55, United States Code, and any regulations issued pursuant thereto, inherently and as construed and applied in this case, do not violate the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States, and did not deny due process of law to each of them as guaranteed by the Fifth Amendment. Title 26 compels *statements* to be made without granting constitutional immunity for doing so. The admission in evidence of statements taken by law under a statutory provision that they are confidential, and which statements constituted compelled testimony, is forbidden by the Fourth and Fifth Amendments to the Constitution of the United States.

VII.

The District Court erred in the admission over objections of books, records and entries without proof of any foundation and because they were hearsay, irrelevant, incompetent and immaterial.

VIII.

The District Court erred in admitting testimony of Samuel J. Phoebus, over objections, as to certain entries in certain book records examined by him in his investigation. This was hearsay and incompetent proof. The Court also erred in failing to instruct the jury that the records had been withdrawn from the consideration of the jury in their absence, and erred by permitting the jury to see them.

IX.

The District Court erred in admitting the invoices of sales as to proof of any act or fact, and in failing to strike them as being without foundation.

X.

The Court erred in failing to strike the testimony of Samuel Namson on motion made. It was irrelevant. There was no foundation under Title 28, Section 695, for the introduction of Exhibits 10 and 11. The testimony showed that the books were not kept in the regular course of business and failed to show that it was the regular custom to keep these particular books. The change in the books was not made in the regular course of business and was to show correction for tax purposes.

The Court also erred in admitting in evidence Exhibits 39 a, b, and c, and evidence regarding them and in failing to instruct the jury that 39 a, b, and c, were withdrawn.

XI.

The statute and regulations were both too vague and indefinite as to what was required to be kept to form the basis of any prosecution on a charge of false entry.

XII.

The Court erred in the instructions given (a) that the prosecution was under the Emergency Price Control Act *as amended* and (revised) regulations thereunder, and (b) that termination of the statute and regulations do not terminate the prosecution.

XIII.

The Court erred in instructing the jury under the Emergency Price Control Act of 1942, *as amended*, and in setting out maximum price regulation 169, not as it was issued, but as revised several times and under different statutes.

XIV.

The Court should have granted the motions for judgments and acquittal.

XV.

The Court should have granted the motions in arrest of judgment.

ARGUMENT.

I.

The Indictment Was Invalid.

The indictment was void on its face. The indictment was returned March 11, 1946 [R. 2.] The indictment alleges:

“Grand Jurors of the United States of America, being duly impaneled, sworn and charged in the District Court for the Southern District of California, Central Division in the *September, 1945*, Term of this Court, among other things, the matter of the investigations charged in this indictment, and having continued to sit by the order of this Court in and for the said District during the *February, 1945 Term* to complete inquiries *begun, but not finished, at the original term*, and inquiring for that District, upon their oaths find and present as follows:” (Emphasis ours.)

The indictment was presented on oath of the grand jury as a true and correct copy of the indictment and was signed,

“A true bill. John D. Boyle, Foreman.” [R. 126.]

It was filed March 11, 1946. This was long after the term of court in February, 1945, and the power and authority of the grand jury under its own oath had expired. The indictment was therefore void. Objection was made to the indictment on account of the fact that it was brought after the term of court in which it was lawfully constituted. [R. 86.] The Court overruled the objections and allowed an exception to the defendants. [R. 87.] It was conceded during oral argument that two grand juries sit in Los Angeles County.

Here we have a solemn allegation by the Grand Jury which in its essence is a jurisdictional statement of the Grand Jury as to its authority to act. On its face, the *jurisdictional statement* of the Grand Jury shows that it was without authority to act.

In *United States v. Johnson*, 123 F. 2d 111, at 117, the Court, at page 118, said as follows:

“No question is raised by the Government but that compliance with the provision is essential in order to give a Grand Jury vitality subsequent to the term at which it is originally empaneled. Moreover, in view of the fact that all inferior courts of the United States are of limited jurisdiction and possess only such power and authority as are expressly conferred, no question could well be raised in this respect. As was said in *Re Mills*, Petitioner, 135 U. S. 263, 267, 10 S. Ct. 762, 763, 34 L. Ed. 107: ‘* * * A grand jury, by which presentments or indictments may be made for offenses against the United States is a creature of statute. It cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal. * * *’

“If a court is without authority to impanel a Grand Jury except as the same is expressly conferred by Statute, it would seem to follow inevitably that a Grand Jury impaneled could only have its authority or power continued to a subsequent term by strict compliance with the statutory provision. The language of the provision plainly limits the authority of the court to continue a Grand Jury to sit ‘during the term succeeding the term at which the request is made,’ and with equal clarity limits the continuance ‘solely to finish investigations begun but not finished by such grand jury.’”

Section 421 (Jud. Code, Sec. 284), as amended April 17, 1940, Ch. 101, 54 Stat. 110, provides as follows:

“* * * The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months:” etc.

Implicit in the decision of *United States v. Johnson*, *supra*, is the holding that the indictment must be returned by a Grand Jury having statutory authority and that *the language of the indictment controls the Court in the authority of the Grand Jury to act.*

In the *Johnson* case, 319 U. S. 503, 87 L. Ed. 1546, at 1554-1555, the Court said:

“The indictment itself alleged that the grand jury ‘having begun but not finished during said December Term . . . an investigation of the matters charged in this indictment, and having continued to sit by order of this court . . . during the February and March terms . . . for the purpose of finishing investigations begun but not finished during said December Term.’ The court below was apparently of the view that a mere denial of *such a solemn allegation by the grand jury puts its truth in issue*, that the burden is upon the government ‘to support it with proof.’ ”

Our situation is the reverse. The indictment itself makes a solemn allegation by the very language of which it would *lack jurisdiction to act*. The indictment was returned as a “*True Bill*.” There is no authority to proceed under it as alleged. The Court must look to the indictment itself and its four corners, like a will, to determine its validity. Absent an essential declaration of jurisdiction it must fail. The indictment itself cannot be changed without invalidating it.

Ex parte Bain, 121 U. S. 1;

Evaporated Milk Association v. Roche, 130 F. 2d 843;

Edgerton v. U. S., 143 F. 2d 697.

If the Court had attempted to strike out the “5” from the indictment and change it to read “6” or “7”, this would have vitiated the indictment.

Ex parte Bain, 121 U. S. 1;

Albrecht v. U. S., 273 U. S. 1;

Edgerton v. U. S., 143 F. 2d 697;

Evaporated Milk Association v. Roche, 130 F. 2d 843, 851;

Carney v. U. S., 163 F. 2d 784.

If, then, the Court could not strike the date or change it, the Court had no power to disregard it, and therefore the indictment was fatally defective in its very language. But if it be argued that this jurisdictional solemn declaration of the grand jury was such an error as might have been amended or corrected, the answer is that no such amendment or correction was proposed. The Court proceeded on the indictment as written, summarily overruling objections to it.

In *United States v. McKay*, 45 Fed. Supp. 1007, at 1015, the Court said:

“A United States District Court is one of limited jurisdiction with only such powers as are expressly conferred by statute. The grand jury sitting in such a court is strictly a creature of statute. *In re Mills*, Petitioner, 135 U. S. 263, 267, 10 S. Ct. 762, 34 L. Ed. 107. There is no such thing as a *de facto* grand jury in a Federal Court. Its original life and authority to act, and any continued existence which it may have after the expiration of the term for which it was impaneled, depends strictly upon statutory authority, and unless that authority is complied with there is no jurisdiction to return an indictment.”

If the indictment on its face alleges lack of statutory authority there is no jurisdiction to proceed.

In *United States v. Enoch L. Johnson*, No. 384-X, the Third Circuit on June 19, 1941, quashed an indictment upon a plea in abatement on the ground that the Grand Jury was without authority. This case is reviewed in 39 Fed. Supp. 965, by Circuit Judge Maris. Since the Grand Jury's work must be regarded with all solemnity, any effort to alter the indictment must necessarily vitiate it.

This circuit has held that an indictment may not be amended in any particular. *Ex parte Bain*, 131 U. S. 1; *Edgerton v. U. S.*, 143 F. 2d 697; *Carney v. U. S.*, 163 F. 2d 784.)

An indictment, as pointed out in *U. S. v. Johnson, supra*, is a solemn allegation by the grand jury, and if an error crept in it, cannot stand, any more than could the indictment in *Carney v. U. S.*, No. 11001, of this circuit.

In *Evaporated Milk Association v. Roche*, 130 F. 2d 843, this Court, in this circuit, considered the question of the expiration of the Grand Jury and held that the issue was jurisdictional within the meaning of Title 28, Section 879.

While the Supreme Court of the United States considered the *Roche* case as to the power of this Court to issue mandamus, the question of the authority of the Grand Jury and its power to sit beyond or within the term was not determined.

In *United States v. Carney*, No. 11001, of this circuit, this Court held that "the court is without power to strike a figure or letter from the indictment."

But, even if it be argued that the Court could do so, it was not done in this case and this court must consider the indictment as it appears on its face.

Furthermore, as pointed out in the oral argument on this case, two and three grand juries sit during a term. The indictment itself was therefore a nullity, and the Court should have sustained the objections made by defense counsel, and which the Court considered on its merits and to which it allowed an exception. [R. 86, 87.]

II.

The Termination of the Statute and the Revocation of the Regulations Thereunder Ended Any Possibility of Any Prosecution.

There Was No Charge Upon Which the Appellants Were Duly Tried Under the Indictment and the Proceedings Were Therefore in Violation of Due Process of Law Guaranteed by the Fifth Amendment.

To arrive at a clear understanding of this point, we must revert both to the Statutes, the regulations thereunder, as alleged in the indictment, the amended statute and revised regulations thereunder.

The indictment in each count charged a violation of the "Emergency Price Control Act of 1942" and "Maximum Price Regulation 148, 165, 169 and 239 *thereunder*." [R. 3, 4, 5, 6.]

As to each substantive count, relating to alleged overcharges, the language was as follows:

"The defendants sold meat, for a price per pound which was, . . . in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 *thereunder*." [R. 9.]

Each of the counts regarding meat prices used similar language. Other counts charged violation of the same statute and regulations relating to entries required to be kept in a book or record for the purpose of the statute. Each count thus charged a violation of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, and in some cases, in addition to Regulation 169, Regulations 148 and 239. The principal

regulation, however, was Maximum Price Regulation 169, relating to beef and veal carcasses.

In each instance the indictment alleged the Maximum Price Regulation 169 thereunder, that is, under the Emergency Price Control Act of 1942.

The Emergency Price Control Act of 1942, by its terms, expired on June 30, 1943. (60 Stat. 23.)

Maximum Price Regulation 169 was promulgated July 1942 (7 F. R. 653).

The Congress required that the Administrator state the reasons and grounds for his issuance of any regulation and further that it might be challenged by any person affected thereby.

As a preamble to Regulation 169, which involved beef and veal carcasses, the Administrator said:

“In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purpose of the Emergency Price Control Act of 1942 to establish as the maximum prices for beef and veal carcasses and wholesale cuts the prices prevailing with respect thereto during the period March 16 to March 28, 1942.”

Under the Regulation as thus issued, there were no fixed prices for beef or veal as related to all persons in the industry, but each dealer was frozen as to the prices he was allowed to fix pursuant to sub-division (i) of Regulation 169:

“The seller shall fix a price for each such cut upon the basis of relationship which prevailed, during the base period March 16 to March 28, 1942, between the price of such cut and the prices of other cuts derived from a quater or saddle of the same grade.”

Thus Regulation 169 “thereunder” as alleged in the indictment had maximum prices at a prevailing price of the seller—not a general over-all and universal price for different areas.

Several amendments, or revisions, were promulgated to Regulation 169 and the Administrator himself revoked Maximum Price Regulation 169 on December 10, 1942. (7 F. R. 10381.)

By its very terms, Emergency Price Control Act of 1942 expired June 30, 1943. An amendment was introduced extending its time for one year and the Emergency Price Control Act of 1942 was then thereafter known as *Emergency Price Control Act of 1942, as amended*, and whatever Regulations were issued by the Administrator were issued by him under the authority of the Emergency Price Control Act of 1942, *as amended*, and every revision of the regulation was issued as a Revised Maximum Price Regulation under the Emergency Price Control Act of 1942, *as amended*. Thus, the Administrator in reviving Maximum Price Regulation 169 said:

“In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act of 1942, *as amended*, and Executive Order No. 9250 issued by the President on October 3, 1942, to maintain as the maximum prices for processed products the prices prevailing with respect thereto during the period March 16, to March 28, 1942, inclusive, and to establish for beef carcasses and wholesale cuts specific prices slightly higher than those prevailing during such period. These prices are established as provided in §§ 1364.451, 1364.452 for beef; §§ 1364.466 and 1364.467 for veal; and §1364.476 for processed

products. The Price Administrator has ascertained and given due consideration to the price of beef and veal carcasses and wholesale cuts prevailing between October 1 and October 15, 1941, and has made adjustments for such relevant factors as he has determined and deemed to be of general applicability. So far as practicable, the Price Administrator has advised and consulted with representative members of the industry which will be affected by this regulation.

In the judgment of the Price Administrator the maximum prices established by this regulation are and will be generally fair and equitable and will effectuate the purposes of said Act and Executive Order. A statement of the considerations involved in the issuance of this regulation has been issued simultaneously herewith and has been filed with the Division of the Federal Register. . . .

Therefore, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250 and in accordance with Revised Procedural Regulation No. 1, issued by the Office of Price Administration, Revised Maximum Price Regulation No. 169 is hereby issued."

The prosecutor did not rely on the statute, as alleged in the indictment, but relied on the Amended Statute and *the Regulations issued pursuant thereto*.

The "conspiracy" count of the indictment alleges the commencement of the conspiracy on or about July 1, 1943. [R. 3.] This was one day after the Emergency Price Control Act of 1942 itself had expired and more than six months after Maximum Price Regulation 169 thereunder had been revoked by the Administrator himself,

and several new amendments or revisions had been presented.²

On June 30, 1946, the Emergency Price Control Act, the amendments, and the Stabilization Act of 1944 and its amendments and all regulations under any of them were all terminated.

A Motion to Terminate the prosecution which was then taking place on the ground that the Emergency Price Con-

²Count Two of the indictment alleged as follows:

“Violation of the *Emergency Price Control Act of 1942* and the Maximum Price Regulation No. 169 *thereunder*” [R. 8, 9];

Count Three—“Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*” [R. 9, 10];

Count Four—“Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*” [R. 10];

Count Five—“Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*” [R. 11];

Count Six—“Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*” [R. 11, 12];

Count 12—“Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*” [R. 12, 13];

Count 13—“Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*” [R. 13, 14];

Count 32—“Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulations 148, 169 and 239 *thereunder*” [R. 14];

Count 37—“Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*” [R. 15];

Count 38—“Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulations 169 and 239 *thereunder*” [R. 15, 16];

Count 39—“Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulations 169 and 239 *thereunder*” [R. 16, 17];

trol Act under which the prosecution was brought is now automatically terminated and that the Court was without jurisdiction to proceed was denied by the Court. [R. 43, 44.]

Verdicts were not returned until July 2, 1946, and judgment was not pronounced until July 5, 1946. [R. 53-56.] No law or regulation of any kind was then in existence.

Count 40—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 17];

Count 41—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 18];

Count 42—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 18, 19];

Count 43—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 19, 20];

Count 44—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 20];

Count 45—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 21];

Count 46—"Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 22];

Count 47—"Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 22, 23];

Count 48—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 23, 24];

Count 49—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 24, 25];

Count 50—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 25].

Congress in enacting a new law relating to Price Control Extension Act of 1946, referred to the Emergency Price Control Act of 1942 throughout *as amended*, not to the Emergency Price Control Act. Also, the new Act, *as amended*, which was enacted on July 25, 1946, specifically excepted and exempted, from any extension, any requirement relating to meat.

Therefore, all laws and regulations relating to meat had expired on June 30, 1946, and no law or regulation, under any circumstances, whether under the Act which was amended in 1943 and under revised regulations, was thereafter in any wise applicable to the appellants.

At the very outset of the trial, there was a demand for a *Bill of Particulars* in which the defendants asked for particulars as to the regulations they were charged with violating, as to the prices at which they were alleged to have sold, and as to the maximum prices which it was contended by the Government were permitted to be charged under the particular regulation alleged for the character of beef allegedly sold. The Demand for Bill of Particulars [R. 28-32] was denied. [R. 32.]

The question thus presented is WHETHER A DEFENDANT, IN A CRIMINAL ACTION, MAY BE TRIED UPON AN INDICTMENT SETTING OUT AS A FACT THAT THE PROSECUTION WAS UNDER AN EMERGENCY STATUTE, WHICH BY ITS VERY TERMS EXPIRED IN ONE YEAR, AND PURSUANT TO REGULATIONS ISSUED THEREUNDER, WHICH HAD NO APPLICATION TO THE CASE AT BAR; AND WHETHER SUCH PROCEDURE AND PROCEEDINGS ARE TOTALLY VOID AND IN VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In *De Jonge v. Oregon*, 299 U. S. 353, 81 L. Ed. 278, it is stated:

“Conviction upon a charge not made would be sheer denial of due process.”

And, in *M. Kraus & Bros. v. United States*, 327 U. S. 614, 90 L. Ed. 894, at page 899, the Court said:

“But patent omission and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator’s regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express work or fair implication. Not even the Administrator’s interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States v. Resnick*, 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126.”

The defendants in being informed of the nature and cause of the accusation had only the indictment to look to. That indictment must of necessity set forth the nature and cause of the accusation with certainty and clarity. (*United States v. Cruickshank*, 92 U. S. 542, Sixth Amendment to the Constitution of the United States.)

Thus, the indictment alleged an offense under a statute which had actually expired and the trial had continued at a time after all statutes relating to the subject had expired, and judgment was pronounced thereafter; also, the indictment alleged a regulation which did not cover the charge on which the defendant was tried and which contained no specific ceiling or base prices on the theory of which the defendants were tried.

The Constitution has warned the defendant to look to the indictment for the nature and cause of accusation. (Sixth Amendment to the Constitution of the United States, also *U. S. v. Cruickshank*, 92 U. S. 542, 23 L. Ed. 588.) It has also told the defendant to look to regulations and orders issued pursuant to statutes, both of which must be set forth with clarity and certainty. (*M. Kraus & Bros. v. United States*, 327 U. S. 622, 90 L. Ed. 899.)

Looking at the indictment, therefore, the accused is told that he is violating the Emergency Price Control Act of 1942 and violating Maximum Price Regulation No. 169 thereunder. Thus, he is directed to look for his alleged violation of law to the Act between 1942 and 1943 and to the Maximum Price Regulation thereunder, No. 169, which was published in 7 Federal Register 4653.

We submit that the indictment as it thus proceeded was a total nullity, and that the Court was without jurisdiction to proceed.

The trial Court, recognizing partly the situation, thus attempted to instruct the jury that “I now instruct you that under the Emergency Price Control Act of 1942, *as amended*.” [R. 362.] Again he charged them: “Under the Emergency Price Control Act of 1942, *as amended*, a person is prohibited from wilfully making or causing another to make any false statement or entry in any document or record required to be kept under that law or regulation issued under it.” [R. 364.] The charge, of course, was different from the allegations in the indictment, which did not charge the Emergency Price Control Act of 1942, *as amended*, nor the regulations under the *amended Act*, which themselves had been revised and were promulgated by the Administrator as revised regulations.

In *Viereck v. United States*, 318 U. S. 236, 87 L. Ed. 734, the Supreme Court of the United States held that the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction, nor to be altered by reference to rules or regulations pursuant to a statute. And, we assert that the words of an indictment cannot be altered to add the word “*as amended*” to a statutory reference in an indictment when those words are not there.

We submit, therefore, that the jurisdiction of the Court to proceed was wholly lacking.

III.

The Indictment and Proceedings Violated the Due Process Clause of the Fifth Amendment to the United States Constitution and the Sixth Amendment in Failing to Inform the Accused of the Exact Nature and Cause of the Accusation.

Where the crime is statutory and depends upon regulations to implement the statute and the indictment alleges a statute which by its terms has terminated, or expired, and a Regulation which was then non-existent, we submit that there was no *certainty to a common intent in the indictment*, required to afford the appellants due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and by the Sixth Amendment to the Constitution of the United States to be informed of the nature and cause of the accusations.

(*M. Kraus & Bros. v. United States*, 327 U. S. 614, decided 1946.)

As stated in that case:

“But patent omission and uncertainties cannot be disregarded when dealing with a criminal prosecution.”

(See *Potter v. United States*, 155 U. S. 438, 39 L. Ed. 214; *United States v. Maria*, 15 L. Ed. 531.)

We must look to the indictment itself to determine if it properly charges an offense against the laws of the United States—that is attempting to sustain it. If the indictment does not sufficiently charge an offense, and apprise the accused of what he has to meet, then no crime has

been spelled out, either in the indictment or in the trial itself.

Williams v. United States, 168 U. S. 382;

M. Kraus & Bros. v. United States, 327 U. S. 614,
90 L. Ed. 894;

Capone v. United States, 51 F. 2d 609, 616.

We concede that if the indictment had set out specific facts setting out an offense instead of mere conclusions, and in such facts the allegations regarding the statute were erroneous, that an offense might still be spelled out.

But here the facts alleged in the indictment incorporated the statute as one of the facts, and that fact had to be implemented by a regulation under it. Neither the statute as amended, nor the new regulation as revised under which the charge was attempted to be tried, were alleged in the indictment. The statute itself had terminated and the Regulations had been revoked. An amended statute and revised regulations were thereafter set out. The defendants were not charged with violating the amended statute nor the revised regulations. Nor did the pleader set up any facts from which it could be concluded that a different statute or regulation was charged.

As stated in *United States v. Hutchinson*, 312 U. S. 219 at 229:

“In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment, but it may nevertheless come within the terms of another statute. (See

Williams v. United States, 168 U. S. 382, 42 L. Ed. 509.) On the other hand, an indictment must validly satisfy *the statute* under which the pleader proceeded. Other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman law but the related enactments which entered into the decision of the District Court.”

In the *Hutchinson* case the long indictment set out *facts*. These facts were full and clear, and the indictment did not rely on merely a statutory reference or designation. The Supreme Court said: “Summarizing the long indictment these are the facts. . . .” (312 U. S. 227.) In our case the indictment makes the statute and the regulations thereunder the statement of facts. These could not under the facts thus alleged constitute an offense. Where facts are full and complete and thus set out a violation of the law the designation of the pleader of the statute would be immaterial but where the only facts alleged are essential the statute and regulation thereunder, the indictment must be judged from those facts.

In *United States v. Hutchinson* the Court said:

“Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes? *If the facts laid* in the indictment come within the conduct enumerated in Section 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman law,” etc. (312 U. S. 232.)

The indictment must be judged exclusively from the *facts alleged* and not from conclusions, characterizations and epithets of the pleader.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;

Batchelor v. United States, 156 U. S. 426, 39 L. Ed. 478.

The Court in the *Hutcheson* case said:

“Clearly, then, the *facts* here charged constitute lawful conduct,” etc. (312 U. S. 233.)

The facts charged in our case constituted lawful conduct under the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 *thereunder*.

Likewise the amendment to the statute and repeal of regulations and the issuance of revised Regulations and their final termination drew the sting of criminality from any alleged violation of the Maximum Price Regulations issued under the former statute. (See *United States v. Cohen*, 270 U. S. 339, 70 L. Ed. 616.)

The Trial Was a Sheer Denial of Due Process of Law. The Indictment Fails to State a Public Offense.

In *DeJonge v. Oregon*, 299 U. S. 353, at 362, 81 L. Ed. 278, the Court held that a conviction upon a criminal charge not made is a denial of due process of law. At page 362 the Supreme Court says:

“Conviction upon a charge not made would be a sheer denial of due process.”

The Court points out that the charge cannot be extended beyond the limitations in the indictment.

In *Viereck v. United States*, 318 U. S. 236, 87 L. Ed. 734, the Supreme Court held that the unambiguous words of a statute which impose criminal penalties are not to be altered by judicial construction, nor to be altered by reference to rules or regulations issued pursuant to a statute; nor can the word of an indictment be altered to add the words "as amended" to a statutory reference in an indictment when those words are not there. (*Ex parte Bain*, 121 U. S. 1.)

The defendants were tried on a charge not made and the indictment was void and in violation of due process. (*DeJonge v. Oregon*, 299 U. S. 353.)

Sixth Amendment, United States Constitution;
Carney v. United States, 163 F. 2d 784;
Samuels v. United States, 169 F. 2d 789;
Ex parte Bain, 121 U. S. 1;
Sutton v. United States, 157 F. 2d 661;
Cruikshank v. United States, 92 U. S. 542;
Skelley v. United States, 37 F. 2d 503;
Partson v. United States, 20 F. 2d 127;
Grimsley v. United States, 50 F. 2d 509, 511-12;
Shulten v. United States, 257 Fed. 724;
Moore v. United States, 160 U. S. 268.

The provisions of the Sixth Amendment to the Constitution of the United States require that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This does not permit some other accusation "as amended." Where the

offense is statutory, which requires implementing by a regulation, it must be so definite and certain as to inform the defendant of the exact statute and the exact regulation. Where the indictment fails to set forth every ingredient of the offense as to which the defendant is to be tried, it fails to comply with the Sixth Amendment. (*Sutton v. United States*, 157 F. 2d 661, 663.)

One cannot be charged with one crime and tried on another where the crime charged has only a statutory reference as its notice, and where it needs implementing by a regulation under that then existing statute and where the indictment fails to set out facts from which one may be able to know that he is charged with a specific crime under a specific existing statute and regulation. This is not a case where the indictment alleges essential facts necessary to describe the accusation with accuracy and particularity, so that anyone examining it would know exactly the crime charged. Under such a situation, one might be charged with a crime which inaccurately refers to a statute and a regulation. This indictment alleged as a fact that the violation consisted of violating a nonexistent Act and a Regulation thereunder, which did not provide for any such facts as the Government later sought to prove. Such an indictment, we respectfully submit, fails to state an offense against the laws of the United States. To withhold essential facts in the indictment that are required to describe the accusation with accuracy and certainty is to deny full information of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution of the United States.

Sutton v. United States, 157 F. 2d 661;

United States v. Cruickshank, 92 U. S. 542, 557.

As said in *United States v. Ferranti*, 59 Fed. Supp. 1003, the indictment must set out the nature and cause of the accusation and no element of the crime charged must be left to conjecture or surmise. In that case the Court sustained motions to quash counts 1 to 18 of the indictment, where Maximum Price Regulation 169 had been revised twice after the return of the indictment. The Court sets out in full the requirements that an indictment set out the exact charge which the accused must face and under the exact regulation, which becomes important to the defendant in determining under which amendment he is to be tried in respect to each of said counts in the indictment.

“Without that knowledge it would be difficult for him to prepare his defense. It may be too late for him to produce witnesses to answer the Government’s charges if he learns the essential details thereof only after he has been put on trial.”

The Court quotes from *United States v. Potter*, 56 Fed. 83:

“In order to properly inform the accused of the ‘nature and cause of the accusation,’ within the meaning of the constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated, minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details.” (And we may add here, as to the exact statute and the exact regulation.)

A defendant should not be required to guess at what he is charged with, namely, that although the prosecutor

charged him with a violation of a statute which has expired, he has to assume that he is charged with an amended statute not alleged, and then permit the prosecutor to rely on a Court of Appeals to relieve him of his carelessness and lack of specificity in such a solemn declaration as an indictment. Where the error is exposed on appeal, the prosecuting attorney seeks to have the Appellate Court justify the unconstitutional proceeding, but the liberty of a citizen cannot be risked on so slim a basis. See cases cited in *United States c. Ferranti*, 59 Fed. Supp. at page 1004; also *United States v. Potter*, 56 Fed. 83, 89.

In *United States v. Interstate Properties*, 153 F. 2d 469, at 471, the District Court of Columbia also sustained demurrers to an indictment for vagueness and uncertainty of the indictment, concerning statutory or regulatory requirements, and in *United States v. Crummer*, 151 F. 2d 958, 962, the Court also reviewed the need for an indictment to allege the nature and cause of the accusation with clarity and certainty and must descend to particulars and charge every constituent ingredient of the crime, which means the specific statute relied on where the charge is based upon a statutory offense.

In *United States v. Durst*, 59 Fed. Supp. 891, the Court sustained demurrers to an information charging a violation of War Food Distribution orders, where the statutes or regulations supposedly relied on were indefinite and uncertain.

If so, this Court could have taken judicial notice in *Carney v. U. S.*, 163 F. 2d 784, that there were no K-14 ration coupons. Congress itself in amending the Act in the amending statute cited that what it was amending was the Emergency Price Control Act as *amended*. We set

out here the Act of Congress in full, setting out the language of Congress with reference to the amendments. Sections 17, 18 of Act of July 25, 1946, c. 671, 60 Stat. 678, provides:^a

^a“Sec. 17. This Act may be cited as the ‘Price Control Extension Act of 1946.’

“Sec. 18. (1) The provisions of this Act shall take effect as of June 30, 1946 and (2) all regulations, orders, price schedules, and requirement under the Emergency Price Control Act of 1942, *as amended* (except regulations or requirements under sec. 2(e) thereof relating to *meat*, flour or coffee) and the Stabilization Act of 1942, *as amended*, which were in effect on June 30, 1946, shall be in effect in the same manner and to the same extent as if this Act had been enacted on June 30, 1946 and (3) any proceeding, petition, application, or protest which was pending under the Emergency Price Control Act of 1942, *as amended*, on June 30, 1946, shall be proceeded with and shall be effective in the same manner and to the same extent as if this Act had been enacted on June 30, 1946: Provided, That in any case in which the Emergency Price Control Act of 1942, *as amended* (except sections 204 and 205), or the Stabilization Act of 1942, *as amended* (except sections 80 and 9), or any regulation, order, or requirements under either of such Acts, prescribes any period of time within which any act is required or permitted to be done, and such period had commenced, but had not expired on June 30, 1946, such period is hereby extended for a number of days equal to the number of days from July 1, 1946, to the date of enactment of this Act, both inclusive: Provided further, That any act or transaction, or omission or failure to act, occurring subsequent to June 30, 1946, and prior to the date of enactment of this Act, shall be deemed to be a violation of the Emergency Act of 1942, *as amended*, or the Stabilization Act of 1942, *as amended*, or of any regulation, order, price schedule, or requirement under either of such acts: Provided further, That in so far as the provisions of this Act require the Administrator to make any change in any maximum price, such provisions shall not be deemed to require such change to be made before the thirtieth day following the date of enactment of this Act.”

If the words "as amended" were not necessary Congress did an idle act.

It will be noted first of all that Congress referred in the Price Control Extension Act of 1946 to the Emergency Price Control Act of 1942, *as amended*. This was an entirely new Act in 1944. It did not refer to the Emergency Price Control Act. It is, therefore, apparent that the title to the law as it previously existed was the Emergency Price Control Act *as amended*, not merely the Act.

It is also to be noted from the above that the Price Control Extension Act of 1942 excepted from the extension any requirements relating to *meat* and that, therefore, all laws and regulations relating to meat and meat prices in fact had expired on June 30, 1946, prior to the time of the trial of this case, and were not extended by the new law. No law or regulation was applicable after June 30, 1946.

In 1944 Congress completely adopted a new Emergency Price Control Act, *as amended*. Counsel, therefore, is mistaken as to his reference to the title of the Act thereafter as referred to by Congress itself, which construed the words "*as amended*" as essential to its reference to the Act, which it was thereafter extending by the subsequent price control Acts.

As a matter of fact, the Emergency Price Control Act of 1942 ceased to be called by that title in 1944. In 1944 a new Act was passed, called the Stabilization Act of

1944 (Ch. 325, Title I, Sec. 101, 58 Stats. 632), amended June 30, 1945 (Ch. 214, Sec. I, 59 Stats. 306).

Issues of slaughtering came under the Stabilization Act, first passed in 1942 (Ch. 578, 56 Stat. 765).

That Act appointed an Office of Economic Stabilizer and completely rewrote price control, making stabilization of prices, wages and salaries all a part of the Act, requiring that particularly relating to slaughter of animals and the requirements thereunder. (Act of Oct. 2, 1942, Ch. 578, 56 Stats. 765.) The provisions of that Act were to terminate June 30, 1944, or at such earlier date as the Congress by concurrent resolution may prescribe (56 Stats. 767) as amended June 30, 1944 (Ch. 203, 58 Stats. 648).

As a matter of fact, the alleged violations of the appellants related to the fixing of prices resulting from the processing of agricultural commodities, including livestock, as defined in the Stabilization Act, where Congress said *a generally fair and equitable margin* shall be allowed for such processing. (56 Stats. 765.) The Act expired June 30, 1946, and during the pendency of this trial. The new Act did not relate to meats or affect appellants.

Congress Thought the Words "As Amended" Were Essential to Each Change in the Statute, so Did the Administrator in Referring to His Authority Under the Regulations. He Also Thought It Essential to Refer to the Regulations as "Revised" Regulations Under the Amended Statute. Can the Pleader in an Indictment Do Less?

The question for this Court to decide then is WHETHER AN INDICTMENT WITHOUT SETTING OUT ESSENTIAL FACTS MAY CHARGE VIOLATION OF A STATUTE MERELY BY A STATUTORY REFERENCE WHICH REQUIRES IMPLEMENTATION BY A REGULATION THEN EXISTING AND THEREAFTER THE DEFENDANT BE CONVICTED AND SENTENCED, NOT ON THE STATUTE AS REFERRED TO IN THE INDICTMENT OR UNDER THE REGULATION AS THEN EXISTING, BUT UNDER AN AMENDMENT TO THE STATUTE AND UNDER A REGULATION WHICH WAS REVISED MANY TIMES PURSUANT TO THE AMENDED STATUTE, ALL OF WHICH HAD TERMINATED. We contend that he may not; that jurisdiction was never acquired of the subject matter in this case by means of this indictment.

Jurisdiction can never be gained by consent of the parties. The proceedings were as much a nullity as the hearing in the Army appeal in *Defense Supplies Corporation v. Lawrence Warehouse Corporation* in the Court of Appeals, 93 L. Ed.

A trial on a charge not duly made by the indictment is a sheer violation of due process of law.

DeJonge v. Oregon, 299 U. S. 353, 81 L. Ed. 278.

The Denial, Under the Circumstances of This Case, of a Bill of Particulars, Was Error.

At the very outset of the case the defendants made a demand for a Bill of Particulars. [R. 28.]

With reference to the conspiracy count, he requested what regulation and what portion of that regulation the defendants were charged with violating, and the charge it is alleged the defendants made for slaughtering services and what prices in excess of the maximum prices it was allegedly charged, and the date of the charge.

As to each of the items allegedly sold, a request was made for the maximum price permitted to be charged at the time and under the particular regulation for the character of beef allegedly sold, and as to which defendant allegedly committed the act.

Likewise, a request was made for the same item as to the entry made in the books, or caused to be made. [R. 30-31.] The Bill of Particulars was denied. [R. 32.]

The Court Erred in Refusing the Defendants a Bill of Particulars, as Demanded.

This demand was in addition to the Motion to Dismiss for want of uncertainty. The indictment itself was in the language of conclusions of the pleader. It merely alleged prices in excess of the Maximum Price. It failed to set out the particulars.

The Motion to Dismiss should have been granted, but in the absence of granting that Motion the Motion to grant a Bill of Particulars should then have been granted.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;

U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516;

Foster v. U. S., 253 Fed. 481;

Miller v. U. S., 288 Fed. 817;

Sixth Amendment, Constitution of the United States.

A defendant is entitled to particulars as to times, places, persons present and other data necessary to make his defense.

New Rules of Criminal Procedure, Rule 7, subd. (f);

Glasser v. United States, 315 U. S. 60, 86 L. Ed. 680.

As a matter of fact, had a Bill of Particulars been furnished, it would have been considered as supplemental to and part of the indictment and might have cured the patent omission which the indictment showed on its face to have regarding prices and regulations allegedly violated. It might have been sufficient to have put the defendants on notice of exactly what they were charged with and what it was expected he had to meet.

The indictment as alleged and without the Bill of Particulars failed to contain charges with sufficient certainty to apprise the accused of what he had to meet so that he might plead the charges.

The prosecution was commenced under a non-existent regulation and a non-existent statute.

The Court was therefore without power to pronounce judgment and the judgments were a nullity.

IV.

The Verdicts Are Contrary to the Law and the Evidence. The Evidence Is Insufficient to Support the Verdict.

(1) The evidence is insufficient to support the verdict on the indictment as laid. The indictment charges the offenses under the Emergency Price Control Act of 1942 and Maximum Price Regulations thereunder. The Regulations thereunder had no fixed prices that were universal, therefore the proof entirely fails insofar as any of the counts are concerned.

We readopt here all of the arguments heretofore urged on this point under the heading that the Statute and Regulations were both terminated at the time of this trial.

(2) Assuming that the defendants could be tried under a Statute and a Regulation not charged in the indictment, by a Statute that was amended and Regulations that were many times superseded, and assuming that the appellants could be tried thereunder, the evidence was still insufficient in the following respects.

I.

Count One charged a conspiracy. Assuming that the charge was under the act as amended and revised regulations, there is absolutely no proof of any conspiracy on the part of the appellants. There is no proof of any unlawful agreement between them to violate the Emergency Price Control Act or Regulations in any of the respects alleged in Count One of the indictment, and in pursuance thereof.

As to the overt acts alleged in the indictment, not a single overt act was proved either as having been done

or as having been done in furtherance of and to effectuate the purposes and objects of the alleged conspiracy. Overt acts (a) to (h) concerned slaughtering services and invoices for them. There was no proof of any of the slaughtering services by the appellants nor any proof of their having issued any of the invoices mentioned therein, nor was there any proof that any of these services were done in furtherance of and to effectuate the purposes of the conspiracy. As to overt act (i), there is no proof that the defendants began operating under the firm name of Southern California Meat Company No. 2, for the purposes of effectuating the object of the conspiracy.

As to overt acts relating to H. N. Sample—H. N. Sample was not a witness and there is no evidence that they accepted any money from him to further the objects of any conspiracy.

There is no evidence that the defendants began operating under the firm name of Central Packing Company in furtherance of or to effectuate the purposes of the conspiracy, nor that they issued any invoices on behalf of the Central Packing Company in furtherance of any alleged conspiracy.

Counts Two, Three, Four, Five, Six, 45, 46, 47, 48, 49 and 50 of the indictment alleged a charge in excess of the Emergency Price Control Act of 1942 and the Maximum Price Regulation 169. Both appellants were convicted on everything, but the testimony as to Counts Two and Three related solely to Hyman Stillman. The witness said he dealt only with Stillman. There is no evidence that he made any purchase from Lou Segal nor that Segal had any knowledge of the same. As to all of the other counts, the witnesses said they dealt only with Segal and they had no dealings whatsoever with Stillman.

There is absolutely no evidence that Stillman knew anything about the transactions.

The evidence against the men, given by men who, if believed, were themselves violaters of the same law—one of them at least stating that he passed on the alleged overcharges to his customers, was not substantial evidence. They were exchanging immunity for what they said. [R. 103.]

There was no corroboration of any of their testimony.

See:

Sykes v. U. S., 204 Fed. 909;

Dahley v. U. S., 50 F. 2d 37.

All of the witnesses were highly uncertain. None testified as to any specific transaction. The prosecutor lead them in his questions. Muehlberger didn't know how much meat he got. He did not weigh it. [R. 101.] He did not know how much meat was delivered. [R. 102.]

Muehlberger, said he gave Stillman \$120.00 a couple of days after the meats were delivered. He did not know exactly what he paid in respect to the various items. [R. 102.]

Since the conspiracy and the substantive counts were all charged in one indictment, it is necessary to segregate them and all of the evidence to see if there is any proof of any conspiracy. Nor could the evidence offered in support of the conspiracy prove the substantive counts.

The testimony of William Muehlberger is only testimony relating to purchase of meat from Mr. Stillman in the fall of 1944, from Southern California Meat Co., #2 [R. 88] on October 25, 1944. There is no evidence of any conspiracy in his testimony.

The testimony of Horace Greeley Weaver relates to the sale of meat in the month of February, 1945, from Mr. Lou Segal. [R. 108.] There is no evidence of any conspiracy in his testimony.

The testimony (over objections) of Samuel Namson, a Public Accountant acting for a Mr. Aaron Rosensweig [R. 139], related to a conversation with Mr. Stillman and Mr. Segal subsequent to any of the transaction, on about April 1945, regarding an entry in their journal, entering certain items on the books as credit entries rather than as sales. Whether their books were kept as individuals rather than a partnership. [R. 146.] Aaron Rosensweig was treated as an individual. Mr. Segal and Stillman were drawing a salary of \$200.00 a week. Mr. Namson thought the account should be kept in another way. Mr. Namson related a conversation he had with Mr. Stillman regarding this money, which had been accumulated from the sale of meats to different customers, which Mr. Stillman called bonuses over and above ceiling prices. However, it in no way proved or established any conspiracy, and was not a conversation in furtherance of any conspiracy.

Mr. Rosensweig testified to investing \$25,000.00, starting out on or about January 1, 1945 in a joint venture with Stillman and Segal for the purchase of cattle for a 90-day period. He got a check back for \$24,000.00. Other than furnishing the money for the cattle business, his testimony did not show any violation of any law.

Allan Locke testified he ran a market known as Dana & Roberts. Allan Locke merely testified to the payment of certain amounts shown on certain invoices, and the amounts shown are the amounts which were actually paid.

Leo Blank testified he worked in the Meat Department of Dana & Roberts and paid certain amounts of money to Louis Segal, towit one penny a pound. [R. 182.] He said he paid one to four cents per pound for veal [R. 185], from Lou Segal. [R. 185.]

Clarence S. Wright said he paid two cents to a Mr. Irving. [R. 22, 222.]

Donald Oliver Bircher was an Internal Revenue Agent who secured a voluntary disclosure when Mr. Segal paid his income tax on the same. This testimony is not proof of any conspiracy, nor any declarations in furtherance of any conspiracy.

Krulewitch v. U. S., 17 Law Weekly 4273;

Fiswick v. U. S., 329 U. S. 211, 216;

Brown v. U. S., 150 U. S. 93, 98;

Graham v. U. S., 115 F. 2d 740, 743.

Edward F. Cunningham was an OPA pricing expert, who merely identified prices.

Samuel J. Phoebus, also a Special Agent of the Bureau of Internal Revenue, testified as to a discussion had with Hyman Stillman, regarding books and to alleged admissions by Hyman Stillman to him in the course of that investigation.

None of this testimony, individually or collectively, was any proof of any conspiracy between the two defendants and the two other defendants who were not on trial; nor is there any proof of Paragraph 3 of Count I of the Indictment that any of the acts (a) to (f) were done in furtherance of any conspiracy and to effect the objects of the conspiracy. There is no proof that either of the

defendants prepared Southern California Meat Company invoice No. 14942, showing a charge of \$100.00 for slaughtering.

There is no proof that on July 7, 1944, the defendants prepared invoice No. 14985, showing a charge of \$422.00 for slaughtering, nor that any such acts were done in furtherance of and to effectuate a conspiracy.

An examination of each of the other alleged overt acts fails to show that either of the defendants did any of the things specifically charged in any of the overt acts, or that any of those acts were done in furtherance of and to effectuate the purposes and objects of a conspiracy.

Before one may be convicted of a conspiracy, there must be not only proof of the conspiracy, but there must be proof that at least one overt act was done in furtherance of and to effectuate the objects and purposes of the conspiracy. And, furthermore, there must be unanimity on the jury as to the overt act which it is alleged the defendants committed in furtherance of and to effectuate the objects of the conspiracy.

We have been unable to find any evidence in support of a single overt act that was charged and in support of any proof that the act was done in furtherance of and to effectuate the object of the conspiracy. Therefore Count One of the indictment must fall for lack of proof.

Count Two of the indictment charged the sale of meat by Charles M. King, Hyman Stillman and Lou A. Segal. There is no evidence whatever that Lou Segal had anything to do with this transaction, nor that he sold it at any over ceiling price. Evidence offered in furtherance

of the conspiracy count was not admissible to prove these counts.

The witness thought he gave Mr. Stillman a check for \$120.00 [R. 92] and he paid the invoice price of \$312.23 by check and five cents over. [R. 95.] He paid this a few days after he received the meat. [R. 105.] He did not weigh the meat. He could not testify as to the exact quantity he received. [R. 101, 102.] The meat was delivered when he wasn't there. [R. 101.]

Thus, Counts Two and Three relate only to Mr. Stillman.

Counts Four, Five and Six relate to meat sold to the Clover Meat Company, which was represented by Horace Greeley Weaver, and his testimony related only to transactions with Mr. Lou Segal. [R. 108.]

While there was an assurance to connect it up with Mr. Stillman, it never was connected up with Mr. Stillman. [R. 109.] None of the other counts were connected up with Stillman.

As to Count 12, there is no evidence that the defendants, or either of them, made or caused to be made a false entry on invoice 1666. There is no proof that the defendants made the entry. There is no proof that the invoice was an invoice kept in the regular course of business where it was customary to keep such an invoice. Therefore, nothing was proved as to Count 12.

As to Count 13, there is no proof that Mr. Stillman and Mr. Segal made, or caused to be made, any entry on invoice 718, or that they caused a false entry to be made upon it, or that such a record was required to be kept

under the Maximum Price Regulation 169 originally adopted.

There is no proof that invoices, documents or records were to be kept under the provisions of the Emergency Price Control Act of 1942, even as amended, nor under the Maximum Price Regulation 169 thereunder, or as superseded.

The Revised Regulation, regarding the keeping of records and reports, only required the person making a sale to make and preserve for inspection by the OPA for so long as the Emergency Price Control Act of 1942, as amended, remains in effect a complete and accurate record. No particular record or type of record is set forth. (S. 1364.407 Revised Maximum Price Regulation.) There is no provision in the regulation for giving an invoice to the purchaser or that that invoice was any record made and preserved for inspection by the OPA.

The prosecution utterly failed to produce any evidence of any records of the defendants which were made and preserved by inspection by the Office of Price Administration. They failed to prove that the invoices of purchasers were such records.

As to Count 32, the records of the Central Packing Company were not introduced in evidence. There was no evidence showing a false entry upon the said books; there was no showing that the entry of the receipts of the Central Packing Company were false, and only a dispute as to how the entry should be entered. It is not shown that the particular ledgers were such books as were required to be kept pursuant to the Emergency Price Control Act of 1942 (even as amended), or the Maximum

Price Regulations 148, 169, 239, even as revised. There is no showing that there were not some other books and ledgers which were kept pursuant to the statute. There is no proof that the method of bookkeeping was false. There is a difference between falsity and a mistake. The evidence shows that the books in question, even if material, were kept according to the way that it was thought proper to keep them, and that they were corrected in accordance with the third partner's accountant's desire to correct them.

It was not shown that these books were ever seen by anybody else prior to the correction, or that they ever were inspected by any OPA official prior to their correction.

As to Count 37, there is no evidence that either defendant made or caused to be made a false entry upon invoice 5110, or that said invoice was one of the records being kept pursuant to the Emergency Price Control Act of 1942 (even as amended) or as to Maximum Price Regulation No. 169 thereunder (even as revised).

All that the Regulation required was to keep records; it didn't require any particular records, and there is no showing that the invoice was one of the records being kept pursuant to that Regulation.

The same argument is applicable to Counts 38, 39, 40, 41, 42, 43, and 44.

As to Count 45, there is no showing that Mr. Stillman had anything to do with the transaction. The same is true with Counts 46, 47, 48, 49 and 50. All of the Dana & Roberts transactions were carried on with Mr. Lou Segal. There is not one scintilla of evidence to connect Mr. Stillman with them.

As to Count 47, the record shows that the witness was not sure to whom he had made any overpayment. [R. 193.] Yet both men were convicted on this count.

As to Count 50, the record does not show any evidence as to whom the overcharge was made. [R. 193.] Again both men were convicted.

There is no evidence whatsoever that either of the defendants knew what the other was doing. Quite the contrary, the Government's evidence shows the opposite in the statement of Segal taken by the Revenue agents. [R. 263, 268, 269.]

Although the only testimony given in relation to Counts Two and Three referred to Mr. Stillman [R. 93, 98], the defendant Segal was also convicted on this count. And, on the other counts on which the reference was only to Segal, nevertheless the jury arbitrarily convicted as to Mr. Stillman.

The evidence did not support any of these convictions.

Counts 12, 13, 32, 37, 38, 39, 40, 41, 42, 43 and 44 are counts alleging that a false entry was made in a book or record required to be kept for the purposes of the OPA statute. There is no evidence whatsoever that any of the records which were introduced in evidence were records that were being kept to fulfill the requirements of the statute. On the contrary, the records were of a kind that might not be kept for that purpose. Nor was there any evidence as to just what records the appellants did keep if they were not keeping a separate and distinct set of records for the purpose of fulfilling the requirements of the OPA statute.

The offense could only be committed if false entries were kept on records that were being kept for the purposes of maintaining accurate records for inspection by the Office of Price Administration. It was incumbent upon the Government to prove that the documents which they offered were the documents kept by the appellants pursuant to the requirements of the statute to make and preserve for inspection by the Office of Price Administration as a complete and accurate record of each sale of meat subject to the Revised Regulations and the price charged or received or paid therefor. If the seller did that, it became immaterial what other invoices or books or documents were being used.

Counts 12, 13, 37, 40, 41, 42, 43 and 44 charge a false entry on an invoice. There is no evidence as to who prepared the invoice or how it was prepared. None that either of the appellants had anything to do with the preparation of the invoice; nor is it shown that the invoices were the documents being kept by the appellants pursuant to the Emergency Price Control Act of 1942 or any regulations thereunder.

Count 32 related to a ledger. An examination of the ledger showed that there were only ledger entries therein such as are commonly kept in a ledger account in a large sum entry, without explanation as to reference to a journal or other books of original entry. It is evident that a ledger is not such a book as is kept or required to be kept pursuant to the Revised Regulation under the amended statute, No. 1364.407.

Counts 38 and 39 apply on a statement given to the seller. Such a statement was one given to a buyer as a

statement of the sum due and certainly is not a record kept or required to be kept by the statute and regulations.

Prices on Invoices Were Prices Charged.

The invoices introduced into the evidence were actually the price charged, according to the government's theory. The testimony of witnesses as to any other amounts given were a gratuity—or a tip—not for the meat but to the individual himself for services otherwise.

When a waiter brings a restaurant bill, that is the price charged. The tip which one leaves is a gratuity and is not a charge.

The statement of Mr. Segal which the Government introduced as its affirmative evidence, and by which it is therefore bound, if admissible at all, set out that moneys he, Segal, received, were gifts or tips—not charges in excess of maximum prices, and that Stillman knew nothing of them. [R. 265, 266-269.]

We submit, therefore, that there is no proof of any conspiracy to violate the Emergency Price Control Act of 1942, or any Regulations thereunder. There is no proof of any conspiracy to violate the Act, as amended, or any Revised Regulations thereunder. There is no proof of any overt act alleged in the indictment in furtherance of any conspiracy.

As to the overt acts of the substantive counts, except as to Counts Two and Three, there is no proof as to any act involving Hyman Stillman. As to the alleged false entry counts, there is no proof that the invoices were invoices or books required to be kept, or were being kept, for the purposes of the Office of Price Administration.

Therefore, it is respectfully submitted, that the verdicts are contrary to the law and the evidence.

V.

The Regulations as to the Type of Records to Be Kept Were So Uncertain and Indefinite as Not to Form the Basis of Any Criminal Prosecution Under These Counts.

In *M. Kraus & Bros. v. United States*, 327 U. S. 614, 90 L. Ed. 894, it was stated that Regulations, like statutes, must be definite and certain to fall under the ban of unconstitutionality.

Section 1364.407, specifying that every person making a sale of any beef carcass, beef wholesale cuts, veal carcass or veal wholesale cuts, or other meat item subject to this Revised Regulation, "shall make and preserve for inspection by the Office of Price Administration so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale."* It fails to specify what kind of records or

*"S. 1364.407 Records and Report. * * *

"(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor."

where they should be kept, or any details, as to the kind or character of records which shall be kept for the OPA.

As stated in *M. Kraus & Bros. v. United States*, 327 U. S. 614, 90 L. Ed. 894, at page 899:

“But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator’s regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator’s interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States v. Resnick*, 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126.”

VI.

**The Court Erred in the Admission Into Evidence of
the Income Tax Return by Each of the Appel-
lants.**

A.

**There Was No Proper Foundation Laid for Their Admission,
nor Was Any Connection Shown.**

The court erred in failing to strike these returns from the evidence.

Over objections of the appellants, the court permitted the income tax returns of the defendants to be admitted in evidence. Other than the fact that the returns had the blue seal, of the Treasury Department on them, there was nothing to connect these returns with the evidence in the case. A return purporting to be signed by a Lou A. Segal was in fact prepared, according to the statement on the return, by a Jack Effron and it was a typewritten document, which proved nothing and was hearsay as to the appellant. It was not a record the admissibility of which is admitted proved the facts therein set out. It was sheer hearsay. The mere fact that it had a seal of the Treasury Department on the typewritten document proved nothing.

Likewise, the documents signed by Hyman Stillman "was a typewritten document." Who it was prepared by or how, and the authenticity of the signatures, or the knowledge of the defendants regarding it, were nowhere shown in the case.

Judge Denman, in *Greenbaum v. United States*, 80 F. 2d 113, at 126, held such cards produced in the case from tax evidence was reversible error.

The admission of the returns in evidence were prejudicially erroneous for another reason also. There was nothing specific in any of these returns to identify any of the alleged transactions on trial, yet a vague and general admission could be easily misconstrued by the jury.

The transactions were not admissible in proof of any alleged conspiracy. (*Krulewitch v. U. S.*, 93 L. Ed. 17, L. W. 4273.) They therefore were not admissible on that theory. They were too remote on the particular transaction to be admissible.

B.

Title 26, Section 55, U. S. Codes, Inherently and as Construed and Applied in This Case and the Regulations Issued Pursuant Thereto Are Unconstitutional in That They Violate the Defendants' Rights Under the Fourth and Fifth Amendments to the Constitution of the United States.

(a) Members of the Bureau of Internal Revenue were not authorized to disclose the information which they had obtained in the course of their official duties.

(b) Statements as well as income tax returns taken by members of the Bureau of Internal Revenue pursuant to the authority vested in them by statute to compel such statements must either be limited to the use for which they are given or their compulsion violates the Fifth Amendment to the Constitution of the United States.

(c) Since under Section 54, Title 26, the taxpayer is compelled by statute to make such return and statements, the statement has the effect of being compulsory and there-

fore cannot be used against an accused in any criminal trial, unless the statute grants amounts in exchange for compulsion which it requires. Any other provision or construction would be in violation of the Fifth Amendment to the Constitution of the United States.

See:

Feldman v. United States, 322 U. S. 487;

Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110;

Brozen v. Walker, 161 U. S. 591, 40 L. Ed. 819;

Monia v. United States, 317 U. S. 424.

The regulations provide that the United States Attorney is limited to the use in any event for which the inspection was permitted: "When a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished."

This means that the request must be specific and must specifically designate what use is to be made of it and not permit it to be omnibus catch-all general use.

There was a failure to comply with such specific requirements, even if the sections and regulations be construed as constitutional.

Title 26, Section 55, U. S. Codes and Treasury Regulations TD 4945, Sections 463D4, 463D5; TD 4929, Sections 463C34, 463C36, 463C37, 463C35, 45831, 45833, 45834, 45838, 45839, 45890 and 45864, inherently and as construed and applied in this case are unconstitutional

and in violation of the Fifth Amendment to the Constitution of the United States, in that although the statements are compelled through the authority of law the statute does not grant immunity for use of these compelled statements as broad as the provisions of the Fifth Amendment to the Constitution of the United States.

Errors of the Court on Admitting Income Tax Statements.

There is no doubt that the statute and applicable regulations compel disclosure. It does not grant immunity as broad as the disclosure which is compelled.

Counselman v. Hitchcock, 142 U. S. 547-586;

Monia v. United States, 317 U. S. 424.

The Court also erred in admitting these returns on the constitutional grounds. The returns are compelled statements required to be kept by law and the statute, inherently and as construed and applied in the case, would be violative of the self-incrimination clause of the Fifth Amendment to the Constitution of the United States, unless the statute compelling them give immunity as broad as the requirement. (*Feldman v. United States*, 322 U. S. 487.)

VII.

The Trial Court Erred in Admitting Statements Made to the Agents for the Bureau of Internal Revenue.

A.

Title 26, Section 55, authorizes the use of “returns” pursuant to the statutes and regulations applicable thereto and with special permission of the President and the Secretary of the Treasury. However, it does not make statements made to the Bureau in the course of securing any information public. On the contrary, it makes that information confidential and provides a penalty for any agent to violate the section. (Title 26, Section 55(i).) Therefore, it is implicit in the language of the section that only returns are permissible to be used and to be used public, but statements are not. It was therefore error to permit agent Bircher to testify as to statements made to him in the course of his inquiry, and to permit in evidence the statement of the defendant Segal.

It was therefore prejudicial error for the court to admit Exhibits 10, 11 and 33 in evidence and it infringed the constitutional rights of the appellant.

Furthermore, no statement would in any event be admissible on Count One until there had been proof of a conspiracy and that the statements were made in furtherance of the conspiracy.

As there had been no proof of any conspiracy independent of any statement, and no proof that the statement was in furtherance of the conspiracy, it was prejudicial error to admit this document in evidence. (*Krulewitch v. United States*, 17 Law Weekly 4273.)

B.

The Court also erred in the admission of the testimony of Samuel J. Phoebus, another agent of the Bureau of Internal Revenue. [R. 292.] Mr. Phoebus, another Internal Revenue Agent, was permitted to testify over objections that he questioned the appellants Segal and Stillman regarding Government's Exhibit 39, the Books of the Southern California Company No. 2. [R. 294, 295.] This book contained a heading "Sales—Meat for the year 1944." [R. 296.] Page number CR3, record of checks drawn on bank, month of October, 1944. Without any foundation being laid, the Court permitted pages of the book to be introduced into evidence, 39-A, 39-B, 39-C. [R. 298, 299.] The Court then permitted conversations between Segal and Mr. Phoebus and after some objections, the Court's having ruled that these statements were admissible to both defendants [R. 302, 303], the prosecutor himself asked that they be made applicable only to one defendant and the Court struck them all.

Nevertheless, the Court admitted the documents in evidence over objections. There was no foundation laid under the provision of Title 28, §695, that these were the books and record kept in the regular course of business, and it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, within a reasonable time thereafter.

C.

The Court likewise permitted Mr. Phoebus to testify as to conversation with Mr. Segal about his income tax returns, although Title 26, Section 55 does not permit such statements or interviews to be public. Section (i) forbids

the agents disclosing them to anyone. These were not returns; they were statements and interviews regarding returns.

D.

The trial court later, on a motion of the appellant, in the absence of the jury, objecting to Exhibit 39-A, B, C, agreed that "it may be withdrawn." [R. 321.] Nevertheless, the Court at no time instructed the jury that the evidence thus given and withdrawn was stricken from the record, nor was the book actually withdrawn. It remained in evidence and is before this Court. [Exhibit 39.] This was highly prejudicial error. (*Greenberg v. United States*, 80 F. 2d 113, 126.

VIII.

The Court Erred in the Admission of Exhibits 10 and 11 in Which the Testimony of Samuel Namson Was Given. [R. 140.]

Exhibits 10 and 11 were books which were brought to Mr. Namson, a public accountant representing a Mr. Aaron Rosensweig, who became a third partner with Mr. Stillman and Mr. Segal in Central Packing Company in 1945. Mr. Namson asked Mr. Stillman about an item of \$30,100.00 which appeared in the journal as a debit and he thought the item should be entered as sales instead of a debit [R. 149], which he said would show a profit of about \$2,900.00 instead of a loss of about \$27,000.00 or \$28,000.00. This was so that the record could show a correct and true income tax return. [R. 149.] Mr. Stillman then changed the entry and Exhibits 10 and 11 were offered in support of Counts One and 32, and

received in evidence over objections that there was no proper foundation, and that such was irrelevant, incompetent and immaterial. [R. 153.] Motion to strike the books on the ground that they did not conform to the business records statute were denied by the Court. [R. 321.]

There was absolutely no foundation laid for the introduction of these books. There was no showing that these books were kept in the regular course of business or that it was the regular course of business to keep these books, and it was the regular course of such business to make memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. In fact the entry which was made by Mr. Stillman was not made in the regular course of business and it was not the regular course of such business to make such memorandum in the office of an accountant representing someone regarding income tax and for income tax purposes to correct the account. Hence, these records were not in conformity with the requirements of Title 28, Section 695 and could not be introduced to prove the records therein contained.

Count 32 charged the making of a false entry on the general ledger of the Central Packing Company "and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulations 148, 169 and 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act."

There was no evidence, however, that a general ledger was being kept pursuant to said Act; that it was a document required or was the kind of a book required to be

kept pursuant to said Act. As a matter of fact, a general ledger was not such a document required to be kept. The act does not say what kind of record was required to be kept. Furthermore, the ledger was itself withdrawn from evidence by the Government, and it must be assumed that all testimony relating to it was withdrawn.

Furthermore, the testimony of Mr. Namson was merely that he disputed with the appellant Stillman as to how the item should be entered with relation to the partnership, or joint venture arrangement between the three joint venturers. There is nothing to show that it was false, nor that the views which appellant Stillman took were not correct. It was not shown who made the false entry or who caused it to be made, or that either of the appellants had done so.

Samuel Namson came to Mr. Rosensweig's office to figure out whether he had made a gain or a loss in his joint venture with the defendants for a three months period in the slaughtering of cattle. Mr. Rosensweig brought the books to him at his office. A discussion was had between him, Mr. Segal and Mr. Rosensweig. There was a debit entry to accounts payable of \$30,100. The credit entry was credited to Mr. Stillman of \$15,050, and Mr. Segal \$15,050. He (without identification) said they were bonuses and he did not consider them as sales. "The item was changed to sales at the request of Mr. Namson, showing a profit of \$2900.56 instead of a loss." [R. 144.]

The testimony was entirely irrelevant to any proof of any violation of any OPA law.

There was no showing that the books were books and records being kept for the purposes of the OPA Regulation; that they were anything more than joint venture records between the three joint venturers, to show what was due each.

The testimony was objected to [R. 146] as incompetent, irrelevant and immaterial and conversations were objected to. The Court asked: "What is the government's theory on that?" And the counsel for the government replied that: "It will tend to show that these defendants are partners in this concern."

What relevancy partnership is; how it could prove any criminality, we fail to see. The testimony was entirely incompetent.

Motions were made to strike the testimony of Mr. Namson, which the Court admitted, subject to a Motion to Strike [R. 146]; Motion to Strike [R. 321, 322].

There is no showing that anything was done with these books other than to keep them and correct them at the instigation of the auditor for one of the partners. There was no foundation laid for the books. Aaron Rosensweig knew nothing about the books, neither did Mr. Namson. He was not the bookkeeper for Mr. Rosensweig, but just made up the income tax. [R. 161.] It, therefore, was no proper foundation for these pages to show that they were kept in the regular order of business, and that it was usual to keep these books in the regular order of business as required by Title 28, Section 695.

IX.

The Court Erred in Admitting Hearsay Evidence as Foundation for Books and Records.

The government offered in evidence, through the witness Samuel J. Phoebus, special agent of the Bureau of Internal Revenue, pages taken from the books of the Southern California Meat Co. No. 2, and these were admitted as Exhibits 39a, 39b, and 39c, over objection. [R. 299.] The objection was three-fold:

- (1) That no proper foundation had been laid, and
- (2) That the testimony offered as foundation for admissibility was hearsay and
- (3) that the testimony was incompetent, irrelevant and immaterial. [R. 297.]

“Q. And under what circumstances did you see this book? In other words, tell us what happened?
A. I took off a trial balance preparatory to making an examination.

Q. Well, did you find the book on the floor or how did you get it? A. Mr. Stillman handed the book to me.

Q. Did he say anything about it, tell you what it was? A. Well he said, ‘these are the books.’ He handed it to me in response to my request to have a look at the books of the Southern California Meat C., No. 2.”

And further [R. 297]:

“Q. By Mr. Strong: Of whom did you inquire?
A. Mr. Stillman.

Q. What did he say to you, if anything? A. That some of the entries were made by himself and some of the entries were made by the bookkeeper, Laury Rose.

Q. And did I understand that you asked him for the books of the enterprise, the Southern California Meat Co., No. 2? A. Yes, sir.

Q. And did he tell you anything about these being those books? A. Yes, sir."

This entire line of questioning was over the objection of appellants. [R. 294 *et seq.*] Whatever the purpose of the Congress in enacting Section 695 of Title 28, United States Code, may have been, it is clear beyond question that the statute does not do away with the prohibition against hearsay evidence. The statute provides in material part that writings or records made as a memorandum or record of any act, transaction, occurrence or event

"* * * shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

The purpose of this section was to make it unnecessary to call as witnesses the particular parties who made the original entries in records kept in the regular course of business, rather than to make a fundamental change in the established principles of the shop book exception to the hearsay rule. (*N. Y. Life Ins. Co. v. Taylor*, 147 F. 2d 297 (1945).) Or as stated by another court, the intention

was to bring decisions of all federal courts into line with the modern rule that it is sufficient to show that the entry is contained in a book of regular entries maintained in the establishment without producing the particular person who made the original entry and having him identified.

Hoffman v. Palmer, 129 F. 2d 976 (C. C. A. N. Y., 1942), aff'd 318 U. S. 109, 87 L. Ed. 645, 63 Sup. Ct. 477, rehearing den., 318 U. S. 800, 87 L. Ed. 1163, 63 Sup. Ct. 757.

The showing, as the *Hoffman* case puts it, "That the entry is contained in a book of regular entries maintained in the establishment" may not of course, be made by the use of hearsay evidence. The testimony offered by the government to identify the books and records erroneously admitted, consisting of a statement made by a person not under oath and not before the Court to a government witness, constitutes the rankest sort of hearsay. It is fundamental that, whatever the showing is that must be made under the statute, *it must be made by competent evidence.*

This is illustrated by the case of *United States v. Quick*, 128 F. 2d 832, (C. C. A. 3, 1942). The Court said:

"* * * For the purpose of giving meaning to these otherwise meaningless book entries, the government called two witnesses, Kanter and Novick * * *. Kanter and Novick, who had never met or talked to Quick and had nothing to do with making the book entries, testified that certain of the entries indicated payments by Dewinsky to Quick or to Simmons for Quick for 'protection.' Their testimony in such regard was not by way of interpretation from any first-hand knowledge of their own but represented their conclusions drawn from what they said Dewinsky, who kept the book, had told them. * * *

The statute was intended to render admissible in evidence books and records, made in the usual course of business, without further authentication, but it was not intended to make book entries the touchstone by which incompetent oral testimony would become competent.” (*Italics supplied.*)

The same objection was made by appellants with respect to the testimony of the witness Samuel Namson, and his testimony concerning the books of the Central Packing Co. [R. 140.] The witness was a public accountant who was not an employee of the company and had no independent knowledge concerning the books or records of the concern. [R. 139.] The books were delivered to the witness by one Aaron Rosensweig. Rosensweig later testified that he “never” examined the books [R. 160], and “I don’t know nothing about books.” [R. 158.] The only testimony offered by the government as foundation for the introduction of Exhibit 10, consisting of 7 sheets taken from the Central Packing Co., books, and Exhibit 11, consisting of 4 sheets, was the testimony of the witness Namson. Namson’s only basis for believing the books to be those of the Central Packing Co., was because Rosensweig told him. [R. 141.] The witness Rosensweig was asked by the government:

“Q. Did you have anything to do with the books?

A. I never did.” [R. 157.]

And again:

“Q. Did you handle any of the book entries on these books at the Central Packing Company? A. I never did because I can’t write entries and I can’t write even a letter.” [R. 165.]

Rosensweig did not, himself, identify any of the books or records while on the witness stand. That the witness Namson had not the slightest connection with any books or records pertaining to the appellants was admitted by Rosensweig when, in speaking of Namson, the former said: "he is not my bookkeeper, only just the accountant for income tax." [R. 161.]

The Court not only admitted the records of the Central Packing Company solely on the basis of Namson's testimony, but permitted extensive examination of the witness concerning statements allegedly made to him by appellants with reference to certain entries. [R. 142 *et seq.*] This constituted the rankest sort of hearsay and was not admissible under any of the exceptions to the hearsay rule. It is not only fundamental, it is also elementary, that whatever evidence is offered to identify writings and records to show that they were made in the regular course of business and to show that it was the regular course of such business to make the writings or records at the time of the acts, transactions, occurrences or events reflected therein, *must be competent evidence*. Testimony consisting of statements made by third persons to a witness are clearly inadmissible. *Quick v. United States, supra*.

The entire testimony of the Messrs. Namson and Phoebus dealing as it did with specific entries made in the books and records erroneously admitted and restricted by the government as to specific entries in those books and records exhibited to and examined by the witnesses, would have been meaningless had not the books and records been received in evidence. The books and records could not of course, have been used by the witnesses for the purpose of refreshing memory. And any testimony

of the witnesses concerning specific entries in the books or the books thereof would have been subject to the objection that it was not the best evidence. The entire testimony of Phoebus and Namson stems from and could not have been received in the absence of the admission of the books and records into evidence. The errors were, therefore, highly prejudicial and go to the very heart of the entire case of the prosecution. In summary it can be said that the entire testimony of the government witnesses dealing with the identification of all of the books and records offered, and erroneously admitted into evidence, may be boiled down to "Mr. So-and-So told me these were the books and records." It is submitted that the Congress never intended that testimony of this calibre should be accorded any weight in the federal courts.

* * * * *

The Court erroneously charged the jury as follows:

"There remain before you 23 counts." [R. 363.]
"These are Counts 1, 2, 3, 4, 5, 6, 12, 13, 32, 37 to 50, inclusive. Of these, Count 1 has been brought under Title 18, U. S. C. S. 88, commonly called the conspiracy statute. All of the remaining 22 counts have been brought under the Emergency Price Control Act of 1942, as amended, Title 50, U. S. C. App. S. 901, etc., and regulations issued under that statute. These 22 counts pertain to alleged wilful, illegal charges for meat sold by or on behalf of the the defendants, and to alleged wilful false record entries on the books kept by or on behalf of the defendants in connection with their meat business operations under the firm names of, or in connection with the Southern California Meat Co., No. 2, and Central Packing Co. during 1944 and 1945, respectively."

This was plain error on the face of the instruction. The indictment was not brought under the Emergency Control Act of 1942, *as amended*, and regulations issued under that statute.

* * * * *

Again the Court instructed the jury [R. 362]:

“I now instruct you that under the Emergency Price Control Act of 1942, *as amended*, and the Maximum Price Regulations, Nos. 169, 148 and 239, the highest prices which could be charged for the various meat items involved in this case are, as to each count of the indictment concerned with a sale of meat, as I shall now read to you.”

Thereafter it set out certain meat prices, which did not exist under the Emergency Price Control Act of 1942 under which the indictment was brought, nor under the then existing regulations.

* * * * *

The Court again instructed the jury erroneously as follows:

“The prices which I have read to you as the highest lawful price in effect on certain days for the several meat items, to which I have referred, were fixed in accordance with the Emergency Price Control Act of 1942 from which I have just read and those prices, and each and every one of such prices was accordingly fixed by law.

“Under the Emergency Price Control Act of 1942, *as amended*, a person is prohibited from wilfully making or causing another to make any false state-

ment or entry in any document or record required to be kept under the law or regulations issued under it.”

“If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one or more of the persons named in the several counts of the indictment, and that he did in fact charge a price or prices for such meat in excess of the prices *I have stated to you*, and that he at such time or times intended to so sell such meat at higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent.

“Concerning each of Counts 12, 13, 37, 38, 39, 40, 41, 42, 43, and 44 of the indictment, if you believe beyond a reasonable doubt that on or about the dates alleged in the indictment as to each of these counts, the defendants, or any defendant, sold the meat shown in each such count at a price per pound, or a total sum charged in excess of that shown on the invoice, or other record, described in each such count and introduced in evidence in this case, and that the defendants, or any defendant, wilfully and deliberately, and not as a result of innocent mistake, entered, or caused to be entered an entry upon *said invoice*, statement or other record showing such sale, to the effect that the sale was made at a price per pound below that at which the sale actually was made, then you will find the defendant or defendants guilty as charged in that count of the indictment.

“Concerning count 32, if you believe beyond a reasonable doubt that the entry alleged in such count wilfully was false, and that the defendants, or either of them, wilfully and deliberately made, or caused to

be made, such entry or entries, then you will find that defendant, or defendants, guilty as charged in that count of the indictment.

“On the other hand, if you entertain a reasonable doubt as to whether any one or more of the elements I have just recited to you have been proved, you must give the defendant or defendants the benefit of that doubt and acquit him or them.

“Concerning each of counts 2, 3, 4, 5, 6, 45, 46, 47, 48, 49 and 50, of the indictment, if you believe beyond a reasonable doubt that on or about the dates alleged in the indictment as to each of these counts, the defendants or either of them, did on that date sell the items alleged as to each such count in the indictment and that as a part of each such transaction the defendants or either of them did wilfully require of and receive from the purchaser the payment of any sum of money in excess of the maximum price per pound permissible under the Emergency Price Control Act of 1942, and the applicable price regulations issued under that law, then you will convict the defendant, or defendants, of the offense charged in that count, if you find the defendant or defendants engaged in the transaction.”

“The Emergency Price Control Act of 1942, *as amended*, makes it unlawful for any person to sell or deliver any commodity, or to do or omit to do any act in violation of any regulation or price schedule, or to offer, solicit, attempt or agree to do so.

“Maximum Price Regulation No. 169 is a price regulation issued pursuant to the Emergency Price Control Act of 1942. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts.

“*Revised* Maximum Price Regulation No. 169 in part provides :

“S. 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169 shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging, or other charge or discount premium or other privilege, or by typing agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise.
* * *” [R. 364-368.]

This instruction also was erroneous since prices referred to were not prices under the Emergency Price Control Act of 1942 and they were not such prices fixed by law under that act. Furthermore, the next paragraph sets forth under the Emergency Price Control Act of 1942, *as amended*, a person is prohibited from wilfully making or causing another to make any false statement or entry in any document or record required to be kept under that law or regulations issued under it.

The court at no time defined what document or record was required to be kept under the law; nor that any of the documents which the court permitted to go into evidence under the assumed theory that they were documents required to be kept under the law, were or were not such documents.

The Court again erred in giving the following instruction:

“The Emergency Price Control Act of 1942, *as amended*, makes it unlawful for any person to sell or deliver any commodity, or to do or omit to do any act in violation of any regulation or price schedule, or to offer, solicit, attempt or agree to do so.

Maximum Price Regulation No. 169 is a price regulation issued pursuant to the Emergency Price Control Act of 1942. Maximum Price Regulation No. 169 deals with beef and veal carcasses and whole-sale cuts.

Revised Maximum Price Regulation No. 169 in part provides.” [R. 167.]

In another section the Court gave a conflicting instruction as follows:

“The defendants are here prosecuted for alleged violations of the Emergency Price Control Act of 1942, in that they violated certain regulations issued pursuant to this act.” [R. 355.]

The Court also told the jury as follows:

“All of the remaining 22 counts have been brought under the Emergency Price Control Act of 1942, *as amended*, and regulations *under that statute*.” [R. 363.]

Then the Court said:

“Under the Emergency Price Control Act of 1942, as amended, a person is prohibited from wilfully making or causing another to make any false statement or entry in any document or record required to be kept under that law or regulations issued under it.” [R. 364.]

We complain of the instructions because it is given under a statute not charged in the indictment, but under a statute “as amended” and it is given under price regulations that were nonexistent at the time of the statute in question. What we complain about is that the instruction attempted to amend the indictment by adding the words “as amended” and the jury were told that they could bring in a verdict under a law as amended, under which the defendants were not charged. This is a sheer violation of due process of law. (*DeJonge v. Oregon*, 299 U. S. 353, 81 L. Ed. 278.)

Also, we believe that the Court erred in telling the jury that Maximum Price Regulations 169, 148 and 239 were applicable. These regulations were *revised* many times, but the acts charged were in 1945, subsequent to the new Emergency Price Control Act of 1942, as amended, and revised maximum price regulations under the amended statute. The charge therefore was patently erroneous.

In addition to the other errors of instructions, however, the instruction given by the Court falls under the ban of the Court’s decision in *Saul Samuel, et al. v. United States*, 169 F. 2d 789, where this Court said:

“In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. *Kreiner v. United States*, 2 Cir., 11 F. 2d 722; *Kinard v. United States*, 68 App. D. C. 250, 96 F. 2d 522; *Morris v. United States*, 9 Cir., 156 F. 2d 525; *United States v. Levy*, 3 Cir., 153 F. 2d 995; *Corson v. United States*, 9 Cir., 147 F. 2d 437; *Miller v. United States*, 10 Cir., 120 F. 2d 968; *Screws v. United States*, 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330; *United States v. Noble*, 3 Cir., 155 F. 2d 315;

United States v. Pincourt, 3 Cir., 159 F. 2d 917; see 169 A. L. R. 305-355 on the subject generally. *We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all.*" (Emphasis added.)

We think the language of this Court in *Samuel v. United States* squarely covers the case here and requires reversal. Furthermore, this Court said, in *Samuel v. United States*, in the learned opinion by Judge Stephens:

"It is seen that the formula given by the court had no relation to the law as it existed during the period of the alleged conspiracy, and that it is not possible for us to make any comparison as to the effect on the maximum price between the true applicable law and the erroneous law actually applied by the jury. We are not at liberty to assume that the instruction as given was favorable to appellants and, therefore, non prejudicial."

We think much of the language is highly in point in this case. The Court, in the *Samuels* case, said:

"The government also contends that since the court correctly instructed the jury and *there was a ceiling price* and that the case was tried upon that basis, the part of the instruction referring to a markup of 15% is surplusage. We have seen that the premise for this argument is not strictly as the government puts it; but, even so, this contention cannot be sustained."

The Court erred in giving the following instruction over objections:

"As you all know, the Emergency Price Control Act of 1942, as amended expired on June 30th, last Sunday, and the statutes and various price regulations issued under that law are no longer in effect.

At the times the act and violation for which the defendants are charged in this case were allegedly performed, the Emergency Price Control Act and the regulations issued under it were the law and the special provision in our laws makes violations punishable even after the Emergency Price Control Act and the price regulations have ceased to exist. Therefore, you are to consider the matters before you in this case as though the Emergency Price Control Act and the Maximum Price Regulation still remained in full force and effect.” [R. 353-354.]

It was objected to [R. 326] prior to being given.

Since the Emergency Price Control Act of 1942 actually expired in 1943, June 30, 1943, and the Maximum Price Regulations under it had been revoked December 10, 1942, and revised regulations were issued from that time on and all regulations and all statutes had terminated on June 30, 1946, as far as meat was concerned, it was error to give that instruction. There was no savings clause insofar as the statute was concerned to preserve the original regulations, and along the same line the trial court erred in declining to instruct the jury that the effect of the termination of the Emergency Price Control Regulations was to terminate the prosecution of the case. [R. 329.]

On July 5, 1946, the Court pronounced judgment, sentencing the defendants to one year in jail and total fines of \$19,000.00 each. [R. 53, 56.] The Court was without power to proceed under the facts and circumstances of this case.

Samuels v. U. S., 169 F. 2d 789.

The trial court erred in refusing other instructions.

The trial court refused to give the defendants' proposed instruction No. 28. [R. 67.] This instruction was as follows:

"You are instructed that the Government in this case has produced the testimony of agents of the Internal Revenue Department to testify against the accused. Before this testimony can be received in evidence, it must be shown that the statements made were made freely and voluntarily and without the slightest pressure of fear or hope of immunity or reward of any kind or character, or of any benefits to be gained by making the statement.

The mere fact that the statement as made is labeled voluntary does not make it so. You must consider the exact situation in which the accused found himself at the time of making the statement and determine from all of the facts and circumstances as they appear to you, under these instructions, whether the statements as made were freely and voluntarily made.

An accused may be under the greatest of fear or have the highest hopes of reward, and yet say that he is making his statement voluntarily, when in truth and in fact, the statement was not so made in the eyes of the law. If, for the evidence in this case, you determine that any statement made by any accused to the agents of the Internal Revenue Department were not made freely and voluntarily, but were made with any hope of reward or promise of im-

munity, or to benefit the accused by making the statement, such pressure will require you to disregard the statement so made, as though it had never been made.

Lisenba vs. California, 315 U. S. 836, 86 L. ed. 1222;

Chambers vs. Florida, 309 U. S. 227, 84 L. ed. 716;

People vs. Dye, 119 Cal. App. 262.” [R. 67.]

It was offered and tendered on the theory that although agents Bircher and Phoebus testified that their conversations with the defendants Stillman and Segal were voluntary, and that they secured a voluntary statement or confession from them, nevertheless the jury had the right to determine whether, under all of the circumstances, the defendants were actuated by a hope of reward of leniency from the Internal Revenue Department and therefore the statements were in fact not free and voluntary. These were proper questions to submit to the jury. (*Lisenba v. California*, 315 U. S. 826, 86 L. Ed. 1222; *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716; *People v. Dye*, 119 Cal. App. 262.)

To a similar effect was defendants’ proposed instruction No. 26 [R. 66] as follows:

“You are instructed that if you find that any statements which any of the agents of the Internal Revenue Department testified defendants made were made or given by such defendant under compulsion or

fear of prosecution, then you must disregard such statements in determining the innocence or guilt of such defendant or defendants,”

which the Court declined.

For which errors we pray for reversals of the judgments and each of them.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants.

APPENDIX.

Fifth Amendment to the Constitution of the United States:

“No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; * * *”

STATUTE RE GRAND JURIES AND THEIR CONTINUANCE.

Title 28.—Judicial Code and Judiciary:

“§421. (Judicial Code, section 284.) Same; when, how and by whom summoned; length of service.

No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to a district judge of the district that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. If the United States attorney for the southern district of New York shall certify in writing to the senior district judge of said district that the exigencies of the public service require it, said judge may, in his discretion, also order a venire to issue for a third grand jury. The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. **A district judge may, upon request of the district attorney or**

of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by any such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: Provided, That, for good cause shown, the court may, at any time after the end of the term for which the grand jury was originally summoned, excuse any member of the grand jury and summon and impanel another person in his place. Nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of crime or offense, or the time during which a person so accused may be held under recognizance before indictment found. (Mar. 3, 1911, ch. 231, §284, 36 Stat. 1165; Feb. 25, 1931, ch. 297, 46 Stat. 1417; Aug. 24, 1937, ch. 746, 50 Stat. 748; Apr. 17, 1940, ch. 101, 54 Stat. 110.)”

IV.

INCOME TAX RETURNS. WHEN PUBLIC. PRIVACY OF INFORMATION.

Title 26, Section 55, U. S. C. A.—Income Tax:

“§55. Publicity of returns.

(a) Public record and inspection.

(1) Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.

(2) And all returns made under this chapter, subchapters A, B, D, and E of Chapter 2, subchapter B of Chapter 3, Chapters 4, 7, 12 and 21, subchapter A of Chapter 29, and Chapter 30, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Commissioner with the approval of the Secretary. The Commissioner may prescribe a reasonable fee for furnishing such copy.”

Title 26, U. S. C.:

“Sec. 55. Publicity of returns.—

* * * * *

(f) Penalties for disclosing information.

(1) Federal employees and other persons.

It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof, or expenditures

appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding \$1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.”

Title 28.—Judicial Code and Judiciary.—Section 695, U. S. Code:

“§695. Admissibility.

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term “business,” shall include business, profession, occupation, and calling of every kind. (June 20, 1936, ch. 640, §1, 49 Stat. 1561.)”

CONSPIRACY STATUTE.

Title 18, Section 88 (1946 edition), provides as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both. (Mar. 4, 1909, ch. 321, §37, 35 Stat. 1096.)”

EMERGENCY PRICE CONTROL ACT OF 1942.

PERTINENT PROVISION.

Title 50 App., Section 901(b), the Emergency Price Control Act of 1942, provides as follows:

“The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier. . . .” (Note: As to meat, all statutes and regulations terminated June 30, 1946.)

Title 50 App., Section 902(a), Emergency Price Control Act of 1942, provides as follows:

“Whenever in the judgment of the Price Administrator (provided for in section 201 (section 921 of this Appendix)) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by

regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any

commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Title 50 App., Section 904(a), Emergency Price Control Act of 1942, provides as follows:

“It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (sections 922 (b) or 925 (f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing.”

Title 50 App., Section 925(b), Emergency Price Control Act of 1942, provides as follows:

“Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) (section 904 of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.”

The pertinent provisions of Maximum Price Regulation 169—the regulation relating to beef and veal issued under the Emergency Price Control Act of 1942 is as follows:*

Maximum Price Regulation 169 (7 F. R. 4653) was thereafter amended and was Revised Maximum Price Regulation 169.

7 F. R. 5222, 7 F. R. 5426, 7 F. R. 5868, 7 F. R. 6659, 7 F. R. 7314, 7 F. R. 7779, 7 F. R. 7966, 7 F. R. 8948.

Maximum Price Regulation 169 and all its revisions and the title and preamble were amended December 16, 1942 and the applicable sections regarding prices—being Sections 1364.51 through 1364.67—were revoked.

On December 12, 1942, effective December 16, 1942, Revised Maximum Price Regulation added §§1364.401 to 1364.414, §§1364.451 to 1364.455, §§1364.476 to 1364.477, and §§1364.526 to 1364.530 to read as set forth herein. (7 Federal Register 10381.)

Maximum Price Regulation 169 was issued May 11, 1942, at wholesale, and May 18, 1942, at retail. The Regulation fixed maximum selling prices for beef and veal and their products at each seller's highest March selling prices. The Regulation provided that the highest prices should be ascertained by class of purchaser, and that the seller should not change his customary allowances, discounts, or other price differentials unless such change would result in a lower price. In other words, the entire price structure of beef and veal and their

*The whole regulation has been furnished to the clerk. It is set out in 7 Federal Register 4687.

products as well as the prevailing business practices were frozen at their March levels.

On June 19, 1942, the Price Administrator issued Maximum Price Regulations 169, effective July 13, 1942, applicable to beef and veal carcasses and wholesale cuts. The regulation required the maximum selling price for each grade of carcass and quarter of beef to be the price at or above which the seller sold at least 30 per cent of the total quantity of that grade of carcass or quarter of beef sold by him in the base period March 16 to March 28, 1942, and requiring all sellers to grade carcasses and wholesale cuts in accordance with grading specifications of the Agricultural Marketing Service of the United States.

The Regulation was based on information received from members of the industry and independent sources, and on the theory the highest prices at or above which at least 30 per cent of each grade and cut of beef was sold from March 16 to March 28, 1942.

Amendment No. 1 revised the method of car route pricing to provide for a basic price at the sellers' plant rather than at the farthest zone; it permitted each seller to adjust his maximum prices for fores and hindquarters separately, and it granted adjustments under certain conditions to sellers whose maximum prices placed them in an abnormally disadvantageous relationship to their competitors.

Five additional amendments were issued, which related to sellers to hotels, sellers to armed forces and other matters.

Thus, Regulations 169, 148, 156 and 239 had no fixed prices and were issued under the Emergency Price Con-

trol Act of 1942 prior to any amendment. These Regulations were all repealed by the Administrator himself on December 12, 1942, effective December 16, 1942. (7 Federal Regulation 10381.)

Maximum Price Regulation 169 was revised several times, see Pike & Fisher OPA Service 9* pages 41:291 §1364.410 page 41:295C, §§1364.412 and 1364.414, page 41:298, table of Amendments page 41:298-D, as follows:

“(Preamble) The title and preamble are amended, effective December, 1942, §§1364.51 through 1364.67 are revoked, and §§1364.401 to 1364.414, §§1364.451 to 1364.455, §§1364.476 to 1364.477, and §§1364.526 to 1364.530 are added to read as set forth herein:

Revised Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts.

In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250 issued by the President on October 3, 1942, to maintain as the maximum prices for processed products the prices prevailing with respect thereto during the period March 16, to March 28, 1942, inclusive, and to establish for beef carcasses and wholesale cuts specific prices slightly higher than those prevailing during such period. These prices are established as provided in §§1364.451, 1364.452 for beef; §§1364.466 and 1364.467 for veal; and §1364.476 for processed products. The Price Administrator has ascertained and given due consideration to the prices of beef and veal carcasses and wholesale cuts prevailing between October 1 and October 15, 1941, and has made adjustments for such relevant factors as he has determined and deemed

to be of general applicability. So far as practicable, the Price Administrator has advised and consulted with representative members of the industry which will be affected by this regulation.

In the judgment of the Price Administrator the maximum prices established by this regulation are and will be generally fair and equitable and will effectuate the purposes of said Act and Executive Order. A statement of the considerations involved in the issuance of this regulation has been issued simultaneously herewith and has been filed with the Division of the Federal Register.

. . .

Therefore, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250 and in accordance with Revised Procedural Regulation No. 1, issued by the Office of Price Administration, Revised Maximum Price Regulation No. 169 is hereby issued.” (P & F OPA Service 9* p. 41 :291.)

§1364.410 Petitions for Amendment.

“Any person seeking an amendment of any provision of this Revised Maximum Price Regulation No. 169 may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1, as amended, issued by the Office of Price Administration.”

§1364.412 Applicability of General Maximum Price Regulation.

“The provisions of this Revised Maximum Price Regulation No. 169 supersede the provisions of the General Maximum Price Regulation with respect to sales and deliveries for which maximum prices are established by this revised regulation.”

§1364.414 Effective Date.

“Revised Maximum Price Regulation No. 169 (§§ 1364.401 to 1364.414, inclusive; §§1364.451 to 1364.455, inclusive; §§1364.476 to 1364.477, inclusive; and §§ 1364.526 to 1364.530, inclusive) shall become effective December 16, 1942, except that it shall become effective December 10, 1942, as to sales to a war procurement agency.”

TABLE OF AMENDMENTS.

Amdt. No.	Date Issued	Date Effective	Fed. Reg. Citation	Sections Affected
1364:				
4	3-30-43	4- 3-43	8 FR 4097	
5	4-10-43	4-10-43	8 FR 4786	
6	4-12-43	4-14-43	8 FR 4844	
7	4-16-43	4-16-43	8 FR 5170	
8	4-23-43	4-23-43	8 FR 5478	
9	4-28-43	4-28-43	8 FR 5634	
11	5-14-43	5-14-43	8 FR 6427	
12	5-26-43	6- 1-43	8 FR 7109	407(e), 415, 452(o), 455(a), (b), (c), 467(d)(2), 467(n), 470(a), (b)
13	5-22-43	6- 1-43	8 FR 6945	452(d)(2), (3), 452(l)(2), 452(n)(2)
14	5-27-43	5-24-43	8 FR 7199	452(m)(2), 453(b)
15	6- 7-43	*	8 FR 7675	401(e), 452(d)(2) and (3), (1)(2), (m)(2), (n)(2), (n)(3), (o)(4), (5), and (6), (p)(3), (p)(7)(i), (p)(8), 453(d), 454(d), 455(a)(9)(xv), 467(d)(2), (l)(2), (m)(2), (n)(4) and (5), 476(1)
16	6-10-43	6- 8-43	8 FR 8011	452(m)(2), 453(b)
17	6-22-43	6-14-43	8 FR 8677	Effective date, Amdt. No. 15
18	6-24-43	6-22-43	8 FR 8756	453(b)

Amdt. No.	Date Issued	Date Effective	Fed. Reg. Citation	Sections Affected
19	6-30-43	6-30-43	8 FR 9066	468(b)
20	7-22-43	7-28-43	8 FR 10362	406(b)(4), 407(e)(1)(2), 415(a), (b), (c), 452(o)(3), 455(b)(2)(ii)
21	7-16-43	7-16-43	8 FR 9995	452(m)(2), 453(b), 454(d), 468(b), 469(d)
22	7-22-43	7-28-43	8 FR 10363	405(c), 405(d)
23	7-29-43	7-29-43	8 FR 10671	425(p)(3), (7)
24	8- 7-43	8- 7-43	8 FR 11081	415(a), 452(p)(3), 455(b)(1), (2)(v), 470(b)(1), (2)(ii), (v)
25	8-12-43	7-16-43	8 FR 11298	401(d), 411, 411(c), 452(d)(2), (3), 467(d)(2)
26	8-16-43	8-16-43	8 FR 11445	406(c), 405(d), 407(d)(2)
27	9-16-43	9-16-43	8 FR 12748	407(f)(1), (2)
28	9-27-43	10- 2-43	8 FR 13249	406(d), 452(a)(1), 452(b)(1), (m)(2), (3), (o)(4), (5), (6), (p)(3), 454(a)(1), (6), 469(a)(1), 469(a)(6)
29	9-25-43	9-29-43	8 FR 13181	407(f)(2)
30	9-25-43	9-25-43	8 FR 13181	452(m)(2), (3) (same changes as in Amdt. No. 28)
31	10-11-43	10-16-43	8 FR 14009	452(o)(4), (5), (p)(3), (7)(ix)(x)
32	10-21-43	10-21-43	8 FR 14305	452(m)(4), (5), (6)
33	11-11-43	11-11-43	8 FR 15527	405, 405(e)
34	11-30-43	12- 1-43	8 FR 16290	405(f), 531
35	12- 7-43	12-13-43	8 FR	452(d)(2), (3), (l)(2)
36	1-28-44	2- 3-44	9 FR	406(a), 407(e), 415(a), (b), (c), (d), (e), 416, 417, 452(o)(1), (2), (3), 454(d), 455(b)(1), (4), (5), (6), 467(n), 468(d), 470(b)(1), (4), (5), (6)

Revised Maximum Price Regulation No. 169 in part pro-(372) vides:

“S. 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *”

“S. 1364.407 Records and reports. * * *

(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and weight of (373) all beef carcasses, beef wholesale cuts, veal carcasses and veal whole-

sale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor.”

* * * * *

“S. 1364.401 Prohibition against selling beef and veal carcasses and wholesale cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by S. 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *”

(a) *Maximum prices for products not shipped via car route or by carload.* Except as provided in paragraphs (d) and (f) of this section, each seller's maximum price for each beef or veal carcass or wholesale cut not shipped via car route or by carload shall be computed as follows:

(1) The maximum price for each grade of each beef or veal *carcass* shall be the highest price actually charged by the seller during the period March 16 to March 28, 1942, at or above which at least 30% of the total weight volume of the seller's sales of carcasses of the same grade were made during such period.

EXAMPLE: Assume that the seller's sales of choice carcasses of beef during the base period, March 16 to March 28, were as follows:

Price per lb:	Percentage of total Weight Volume	
	Weight Volume in lbs.	(percent)
24¢	1,000	4
23½¢	2,000	8
23¢	4,000	16
22¾¢	5,000	20
22½¢	8,000	32
22¢	4,000	16
21½¢	1,000	4
<hr/>		
Total weight		
Volume	25,000	

The seller's maximum price for choice carcasses of beef is 22¾¢ per lb., for that is the highest price actually charged by him at or above which he made at least 30% of the total weight volume of his sales of such carcasses during the base period. 23¢ cannot be his maximum price, because only 28% of the total weight volume of sales was made at or above that price. 22⅞¢ cannot be his maximum price, for he made no sales during the base period at that price.

(2) The maximum price for each grade of fore-quarter of beef, hind quarter of beef, fore-quarter of veal, hind-quarter of veal, fore-saddle of veal, and hind-saddle of veal shall be determined as follows:

(1) The seller shall ascertain the highest price actually charged by him during the period March 16 to March 28, 1942, at or which at least 30% of the total weight volume of his sales of such fore-quarter, hind-quarter, fore-saddle or hind-saddle was made during the period March 16 to March 28, 1942.

(ii) In the event that the sales of fores and hinds of each grade at the prices computed in subparagraph (2)(i) above would yield a greater total sales realization when sold separately, then the total sales realization, obtainable from the sales of the same fores and hinds of each grade in carcass form, at the seller's maximum price for a carcass of such grade, the seller shall adjust downward the prices of such fores and hinds to remove such excess. In making such adjustment the seller shall not change the price differential in cents per pound between hinds and fores as established pursuant to subparagraph (2)(i). The price so fixed and adjusted shall be the seller's maximum price for such quarter or saddle, and he may not thereafter charge any higher price.

(3) The maximum price for each grade of each *whole-sale cut derived from a quarter or saddle* shall be determined as follows:

(i) The seller shall fix a price for each such cut upon the basis of the relationship which prevailed, during the base period March 16 to March 28, 1942, between the price of such cut and the prices of the other cuts derived from a quarter or saddle of the same grade.

(ii) In the event that the total gross proceeds obtainable through sales at the prices so fixed of *all* cuts derived from such quarter or saddle exceeds by more than \$1.00 per cwt. the total gross proceeds obtainable through the sale of such quarter or saddle, uncut, at its maximum price, the seller shall adjust downward the prices of such cuts to remove the excess over \$1.00 per cwt. In making such adjustments, the seller shall not change the relationship of such prices as established pursuant to subpara-

graph (3(i). The price so fixed and adjusted shall be the seller's maximum price for such wholesale cut.

NOTE: In making computations of total weight volume required by paragraph (a) of this section, the seller shall omit all sales of products which he shipped via car route or by carload.

§1364.53 Duty to maintain and identify grades. No person shall sell or offer for sale, and no person in the course of trade or business shall buy or receive any beef or veal carcass or wholesale cut unless each such carcass or cut has been identified by grade in accordance with the provisions of this section. Each seller shall maintain uniform grades, as specified in paragraph (a) of this section; shall compute his maximum prices upon the basis of such uniform grades rather than upon the basis of his own grades, as provided in paragraph (b) of this section; and shall identify his products by grade letter, as provided by paragraph (c) of this section.

(a) *Uniform grades.* (1) Beef carcasses and wholesale cuts derived from steers and heifers shall be graded into the following uniform grades: choice, good, commercial, utility and cutter and canner. Beef carcasses and wholesale cuts derived from cows shall be graded choice. In determining the grade of each such carcass or cut, the seller shall use the "Specification for Official United States Standards for Grades of Carcass Beef"³ set forth in Appendix A hereof, and incorporated herein as §1364.64, except that, the specifications therein for the two grades,

³Service and Regulatory Announcements No. 99, Official United States Standards for Grades of carcass Beef, United States Department of Agriculture, Agricultural Marketing Administration, issued as amended May, 1942.

cutter and canner, shall be combined and treated as a single grade, and the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice.

(2) Veal and calf carcasses and wholesale cuts shall be graded into the following uniform grades: choice, good, commercial, utility and culls. In determining the grade of each such carcass or cut, the seller shall use the "Specification for Official United States Standards for Grades of Veal and Calf Carcasses,"⁴ set forth in Appendix B hereof and incorporated herein as §1364.65, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice.

⁴Service and Regulatory Announcements No. 114, Official United States Standards for Grades of Veal and Calf Carcasses, United States Department of Agriculture, Agricultural Marketing Administration, issued as amended, October, 1940.

No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

(Second of such Briefs.)

JAMES M. CARTER,

United States Attorney;

ERNEST A. TOLIN,

Chief Assistant U. S. Attorney;

NORMAN W. NEUKOM,

Assistant U. S. Attorney,

Chief of Criminal Division,

United States Post Office and Court House
Building, Los Angeles 12, California,

Attorneys for Appellee.

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No. 11381

IN THE

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FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

(Second of such Briefs.)

Statutes and Regulations Involved.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

Section 4 of the Emergency Price Control Act of 1942 (50 U. S. C. App. 904) provides in part as follows:

"It shall be unlawful, regardless of any contract, agreement * * * or other obligation heretofore or hereafter entered into, for any person to sell or

deliver any commodity, * * * or otherwise do or omit to do any act, in violation of any regulation or order * * * of any price schedule effective in accordance with the provisions of this Act.”

Section 202(b) of the Emergency Price Control Act of 1942 (50 U. S. C. 922(b)) provides as follows:

“The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, * * * to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, * * *.”

Section 205(b) of the Emergency Price Control Act of 1942 (50 U. S. C. 925) provides for penalties for violation or for “Enforcement.”

NOTE: 1946 Edition, United States Code, Title 50, Section 946 (Appendix), “Short Title,” omits the use of the phrase “as amended.” We quote:

“§946. Short title.

“This Act [sections 901-922 and 923-946 of this Appendix] may be cited as the ‘Emergency Price Control Act of 1942.’ (Jan. 30, 1942, ch. 26, title III, §306, 56 Stat. 37.)”

The Act as initially enacted on January 30, 1942, Stat. 23, is termed “Emergency Price Control Act of 1942.” This Act was amended from time to time; however, the amendments primarily dealt with the substitution of a new termination date, *i. e.*, 50 U. S. C. 901(b). Initially, the Act was to have terminated June 30, 1943. The termination date was then advanced to June 30, 1944; thereafter, to June 30, 1945; later, to June 30, 1946; and, finally, to

June 30, 1947. Further reference to the statutes pertaining to such amendments will be noted directly following Section 901, Title 50, U. S. Code.

Maximum Price Regulations 148, 169 and 239 are the Regulations of the Office of Price Administration making detailed provisions with reference to meat products of the type involved in this case.

Regulation 169, and as revised, dealing with the wholesale of meat and veal, particularly applies to this case. A portion of such R. M. P. R. No. 169 is set forth in the appendix to this brief (7 Fed. Reg. 10381, as Amended, issued Dec. 10, 1942, effective Dec. 16, 1942).

Statement of Facts.

The indictment in this case consisted of fifty counts. The appellants, Stillman and Segal, were both found guilty of the same counts, namely, twenty-three in number. For reasons unimportant to this appeal the other counts were dismissed.

BRIEFLY STATED, appellants Segal and Stillman were partners, engaged in the wholesale of meat. The evidence indicated that merchants purchasing meat from the appellants were compelled to pay in excess of the ceiling price. This excess of from one to eight cents per pound above the ceiling was paid to appellants or their employees in the form of cash. Such merchants were billed at the ceiling rate but made side payments to the appellants. The records, or invoices, issued by appellants reflect the ceiling or correct price allowed to be charged. They of course omitted the excess collected on the side. The appellants did not take the stand nor offer any affirmative defense.

The first count charged a conspiracy to violate the Emergency Price Control Act of 1942. 50 U. S. C. App. Sec. 901 *et seq.* The conspiracy count referred to certain Revised Maximum Price Regulations pertaining to the sale of meat, the most important of which is Regulation 169, pertaining to beef and veal. The remaining counts of the indictment charge substantive offenses of two types, *i. e.*, in excess of the legal maximum price allowed and falsification of entries and documents required to be kept under the provisions of the Emergency Price Control Act and Regulations. The substantive counts were likewise predicated upon 50 U. S. C. App., Sec. 901 *et seq.*

The counts on which both appellants were found guilty are identified as follows:

Count 1—Conspiracy count (from July 1, 1943, to March 11, 1946).

The counts charging over-ceiling sales are the following:

Counts 2, 3, 4, 5, 6, 45, 46, 47, 48, 49 and 50. (These offenses are charged to have occurred at specific dates from about August, 1944, through March, 1945.)

The counts charging false entries or falsification of records, of which appellants were found guilty, are Counts 12, 13, 32, 37, 38, 39, 40, 41, 42, 43 and 44. (These offenses likewise are charged to have occurred from about September, 1944, through March, 1945.)

The evidence indicated that the appellants and others had sold wholesale cuts of meat to various retail butchers at prices in excess of the invoice reflected price. Invoices issued for each sale of meat carried the maximum ceiling price as of the date of such sales; in addition, appellants caused an over-ceiling price to be obtained in cash. The evidence indicated that the price per pound obtained in

excess of the invoiced price per pound, or ceiling price, varied from one to eight cents per pound, in most instances being from four to five cents per pound in excess thereof.

Government's witness Edward F. Cunningham [R. 288 to 291] was a Price Specialist of the Office of Price Administrator during the pertinent periods. Witness Cunningham was shown the various invoices or exhibits having been received into evidence and was prepared to testify concerning the maximum price as the same applied to each meat item as of the dates of the specific sales, whereupon counsel for the appellants stipulated with counsel for the Government that the prices shown for the meat items, beef, veal, pork products, etc., on the invoices were the maximum ceiling prices for those items on the dates of sales [R. 290]. The case was submitted to the jury under this theory, as is reflected in one of the court's instructions [R. 362]. No objection was made by counsel for appellants to such instruction.

For the purpose of convenience we have attached to the close of this subheading a chart of the various Government's exhibits, together with the specific counts that such exhibits were offered in support of. This index of exhibits may be helpful. It should, however, not be construed as an admission that the other exhibits, to which no particular count is referred, were not also offered in support of the entire case.

Appellants, Stillman and Segal, were first engaged in the wholesale meat business, as partners, from about August, 1944, to January, 1945, under the name of Southern California Meat Company No. 2.

Later, the appellants entered into a partnership with another person not on trial, namely, Aaron Rosensweig [R. 154], for the purpose of conducting a meat business

known as the "Central Packing Company." This later partnership started about January 1, 1945, for the purpose of buying, slaughtering cattle, and disposing of and selling the meat [R. 156].

Appellant Stillman was the "head man at the office" and operated the office [R. 157]. Rosensweig's obligation was to buy and provide cattle for the business. Appellant Segal was to take care of the plant operations, cooler, salesmen, etc. [R. 156]. This business operated for a brief period of about three months [R. 158], following which the books of the Central Packing Company (the copartnership) was taken by Mr. Rosensweig to a Mr. Namson, also a witness, for the purpose of having income tax returns prepared. Shortly after this partnership had been terminated the assets were divided between the three partners, as is reflected by the checks [Government's Exhibits 12, 13 and 14].

Witness Samuel Namson [R. 139] testified as to certain statements made in his office during either the month of March or April, 1945, by the appellants Stillman and Segal. These statements or admissions were made with respect to Government's Exhibits Nos. 10 and 11, being certain pages from the books of the Central Packing Company.

Witness Namson stated that he, as an accountant, in his desire to prepare the income tax returns for a former partner, Mr. Rosensweig, had had conversations with both Stillman and Segal [R. 142], and had discussed with them entries in the books of their partnership [Exhibits 10 and 11], and particularly he discussed with reference to an entry in the journal of \$30,100 [R. 142-143]. During this conversation witness Namson stated that Stillman told him, Namson, that this money reflected a credit entry

from the sale of meat to different customers, and that appellant Stillman stated, "that this is money which has been accumulated from sale of meat to different customers and he called his bonuses over and above the ceiling prices that they paid" [R. 143]. Witness Namson further inquired of both Stillman and Segal why this \$30,100 was not entered to "sales" instead of crediting it to different partners, and then stated that Stillman said they were bonuses and didn't consider them as sales [R. 143-144].

Witness Namson continued, and stated that he called attention to Stillman and Segal that by a correct entry, namely, after the entry crediting the sales with \$30,100, that that naturally increased the sales from \$1,236,000.00 to \$1,266,000.00. This testimony pertained to Government's Exhibit 10 [R. 144-145]. Witness Namson stated that he corrected the trial balance accordingly, thereby increasing the sales, and Mr. Stillman put the item on the document in his presence on that day.

Namson further testified that Stillman stated: "We are in a partnership or joint venture. Three of us invested an equal amount of money" [R. 147]. Upon cross-examination the witness Namson again stated that Stillman in the presence of Segal, had admitted the receipt of a sizeable sum of money from the operation of the business, namely, as bonuses from the sale of meat over and above the ceiling price [R. 149-150].

Various retail meat dealers testified concerning specific purchases they had made, to the effect that they had paid per pound for meat a sum in excess of that reflected by the various invoices introduced into evidence.

Witness William Muehlberger, a merchant [R. 85], stated that during the fall of 1944 he was acquainted with both Stillman and Segal and that he, witness, conducted a

retail market in the vicinity. Witness was shown Exhibit 1, an invoice bearing Serial No. 6034, which pertained to Count 3 [R. 88], and testified that he had bought the merchandise reflected on the invoice and paid for same, and that in addition he had paid a sum over the amount reflected on the invoice, having paid this money to Stillman at the plant known as "Southern California Meat Company," on East Vernon Street [R. 90]. Witness stated that in addition to the check with which he paid for the meat, as per the invoice, he paid an additional sum of money; that he believed it was \$120.00 [R. 92]. That he had had a discussion with Stillman at or about this time, concerning whether he could get some meat, and that Stillman stated, "Yes, it will be five cents over, Bill" [R. 93]. Witness Muehlberger gave like testimony concerning over-payments of approximately five cents per pound with reference to invoice Serial No. 6109, offered in support of Count 2 [Government's Exhibit 2], stating that he paid five cents a pound in addition to the invoice price [R. 95]; that this sum was paid in cash and that he received no receipt for the cash payment [R. 98].

Another retail meat merchant who testified was Horace Greeley Weaver [R. 107]. He was an employee of a concern known as the "Clover Meat Company." He stated that during 1945, he had a conversation with Segal with regard to purchasing meat for his employer and they held this conversation at the plant on East Vernon Avenue, known as the Southern California Meat Company. Witness stated that in the conversation with Segal he inquired, "How much do you want over for it, Lou?" and that Segal (Lou) stated, "Five cents." I said, "All right, give me some beef" [R. 111].

Witness identified Invoice No. 718, offered in support of Count 13, and stated he procured this meat and paid for it

by check in the full amount of the invoice; that he had paid money to Segal in addition to the check for the meat so obtained [R. 113], for which he did not obtain a receipt; that this was a cash payment.

Witness Weaver then referred to Exhibit No. 4, offered in support of Count 5, and stated he had paid for this meat by check [R. 115-116], and that in addition he paid five to eight cents a pound but that he was not sure as to which invoice he paid five cents, or as to which invoice he paid eight cents a pound [R. 116].

Witness Weaver gave similar testimony concerning several other transactions wherein he stated he paid sums of money in cash to Segal for meat obtained over and above the invoiced amount.

Witness Leo Blank, an employee for a meat concern, stated that he knew both Stillman and Segal [R. 180], and that he had paid to Lou Segal, first a penny a pound over the invoiced amount [R. 182]; later, he had paid from one to four cents a pound over the invoiced listing [R. 184-185]. This witness testified similarly to various invoices that were offered in support of various other substantive counts.

Clarence S. Wright [R. 214], engaged in the meat business, gave similar testimony concerning payment of moneys in addition to the amount reflected on the invoice. He, in particular, stated that he made his payments to a person by the name of "Irving," to whom Segal had told him he should make such payments [R. 220]. He stated that he paid two cents per pound for beef over the amount reflected on the invoice [R. 222].

Witness Donald Oliver Bircher [R. 231], Special Agent of the Bureau of Internal Revenue, gave testimony con-

cerning an interview he had requested of appellant Segal, stating that Segal had called at the Government office on June 9, 1945 [R. 245]; that Segal gave a voluntary statement after having been advised of his rights [R. 246], and that he was then inquiring concerning the income tax liability of Segal and that of the partnership known as the Southern California Meat Company No. 2.

Witness stated that the interview had been taken down by a stenographer and that, later, on June 15, 1945, Segal had returned to the office and that the statement theretofore taken had been signed by Segal on June 15, 1945 [R. 251]. This is Government's Exhibit No. 33. Bircher had been subpoenaed by the Government.

In conformity with the requirements as provided by 26 U. S. C., Sec. 55, with regard to the publicity of returns, and likewise with the Treasury decisions providing for their utilization by the Department of Justice, certain correspondence and telegrams were introduced in evidence to justify the Government's position in using such returns, and likewise in obtaining the testimony of the Internal Revenue Agents Bircher and Phoebus, who both gave testimony concerning, first, the interview with Segal and the taking of his statement [Government's Exhibit 33], and the testimony that Agent Phoebus gave concerning his conversations with the appellants, Stillman and Segal.

Both of these investigations were in the spring and summer of 1945, and pertained to an investigation being conducted by the Internal Revenue, of the income tax liability of Stillman and Segal and their business under the copartnership names.

The documents which were admitted into evidence and which we feel thoroughly comply with the requirements for prior authority and for the utilization of such returns, and

the obtaining of the testimony of the Internal Revenue Agents Bircher and Phoebus, are the following:

Government's Exhibit 30, being a letter from the Acting Commissioner of the Bureau of Internal Revenue, granting authority for Agent Bircher to testify and cooperate with the Government in connection with the investigation being conducted in this case.

Government's Exhibit 32, being two letters, one of which was a carbon copy of a letter dated September 27, 1945, from the then United States Attorney to the Attorney General, requesting that authority be obtained from the Commissioner of Internal Revenue, as there indicated, and the original letter of October 5, 1945, being a reply by the Attorney General, to such letter.

Government's Exhibit 34, being a telegram from the Commissioner of Internal Revenue, authorizing the testimony of Agents Bircher and Phoebus, and others, in conjunction with this case and other investigations being conducted.

Government's Exhibit 38, being a letter from the Acting Commissioner of Internal Revenue, granting authority as outlined in said letter to Agent Phoebus, in connection with this case.

It is thus apparent that compliance was had with the statute and the Treasury decisions with regard to inspection, utilization and the obtaining of testimony relevant to information possessed by said Special Agents in conjunction with their investigation of the income tax matters of both appellants.

Government's Exhibits 35, 36 and 37 are certified copies of returns, all for the calendar year 1944, dealing with either one or the other of the appellants or their copartnership, the Southern California Meat Company.

Portions of Government's Exhibit 33, a statement that Segal gave, was read into evidence [R. 253]. It should be noted that this testimony was limited to Mr. Segal [R. 302-304].

In this statement Segal stated that in 1944 he and Stillman went into business under the name of Southern California Meat Company No. 2 [R. 255]. Segal stated that while he was engaged in this business, early in 1944, he made collections in the form of "gift money" [R. 257], in addition to the prices received from the sale of meat. Segal conceded that he sold his meat at the regular OPA ceiling price and sometimes received from customers sums of money in addition [R. 257]. Segal stated that most of the customers gave him funds on the side when the meat was sold [R. 258], and that the money was generally paid to him by putting it in his white coat pocket; that no change was ever asked in these donations [R. 260]. Segal stated that early in 1945 he had counted this money and had between \$13,000.00 and \$14,000.00 [R. 261].

Segal stated that he received this side money from August, 1944, until the end of that year; "when I was in the cooler they put some money in my pocket," and that the majority of meat customers made such payments [R. 264]; that they were becoming more generous [R. 265]. That his biggest day had been just before Christmas; this amounted to \$2800.00 [R. 266]. That during the year 1945 the amount received as "contributions," or side money, was approximately \$15,000.00 [R. 268]. [This was but for three months.] That he had considered these payments as "extra profits," or "extra gifts" [R. 276]. That the profit for 1944 from customers was approximately \$25,000.00 from "side money" payments [R. 279].

Special Agent Samuel A. Phoebus, of the Bureau of Internal Revenue, also testified for the Government [R.

292-308]. He, like Agent Bircher, had also been subpoenaed. This witness was in a position to give corroborative testimony concerning the interview had with appellant Segal, as is reflected by the written statement [Government's Exhibit 33], as he was present when it was taken [R. 307]. It was stipulated that his answers would be similar to those of the previous agent, Bircher [R. 308].

Witness Phoebus, as previously indicated, also had authority to testify. Among other things he stated that in April of 1945, he talked with Stillman and was handed a book of the Southern California Meat Company [R. 294]; that this was handed to him in response to his request to look at such books [R. 295]. This book became Government's Exhibit 39. Certain pages of it were broken down into 39-a, 39-b and 39-c [R. 299]. Witness Phoebus stated that he discussed certain entries in the pages of this book [Exhibit 39] with Stillman [R. 298]. Witness further testified that the investigation he was then conducting was with relation to income tax returns of the Southern California Meat Company No. 2, also Stillman and Segal [R. 299].

Witness Phoebus also testified concerning a conversation he had with appellant Segal [R. 301], and in particular told of a conversation he had had concerning the partnership income tax return [Exhibit 37]. He testified that Segal had told him the item of \$13,828.29, reflected on this return, was "side money," and that Segal had given further explanation as to having received this money from customers during 1944, and after that when he worked in the "cooler" of the Southern California Meat Company No. 2 [R. 306]. Witness further testified that Segal stated this was from meat customers.

As stated, a list of Government exhibits and the counts to which certain exhibits were particularly directed, is the following:

Government's Exhibits With Reference to Counts.

(NOTE: In most instances, Government's counsel referred to the count the exhibit had reference to.)

Exhibit No.	Page
1. Invoice No. 6034, dated Oct. 25, 1944	
(For Identification)	85
(In Evidence)	94
Count 3. Reference is invited to the Exhibit itself.	
2. Invoice No. 6109, dated Oct. 25, 1944	
(For Identification)	85
(In Evidence)	95
Count 2. Reference is invited to the Exhibit itself.	
3. Invoice No. 718, dated Feb. 26, 1945.	
(In Evidence)	115
Count 13. Offered in support thereof.	112
4. Invoice No. 607, dated Feb. 21, 1945	
(In Evidence)	117
Count 5.	
5. Invoice No. 389, dated Feb. 14, 1945	
(In Evidence)	118
Count 6.	117
6. Invoice No. 1505, dated March 21, 1945.	
(In Evidence)	120
Count 4.	118
7. Invoice No. 1666, dated Feb. 27, 1945	
(In Evidence)	121
Count 12.	120

Exhibit

No.		Page
8.	Invoice No. 165, dated Feb. 7, 1945 (For Identification)	121
	Count 1—Overt act "p."	
9.	Invoice No. 1831, dated March 30, 1945 (For Identification)	121
	Count 1—Overt act "r." (In Evidence)	123
10.	Seven sheets from the books of the General Ledger, Central Packing Company (For Identification)	140
	(In Evidence)	148
	Count 32, and Count 1—paragraphs "c" and "i."	153
11.	Four sheets from the books of the Central Packing Company (For Identification)	140
	(In Evidence)	148
12.	Check for \$24,914.25 to A. Rosenweig (For Identification)	159
	(In Evidence)	160
	Count 1.	
13.	Check for \$25,119.09 to H. Stillman (For Identification)	159
	(In Evidence)	160
	Count 1.	
14.	Check for \$25,119.09 to Lou Segal (For Identification)	159
	(In Evidence)	160
	Count 1.	
15.	Invoices and check, dated Sept. 23, 1944 (In Evidence)	173
	Count 39.	188
16.	Invoice No. 5387, dated Sept. 27, 1944 (In Evidence)	189
	Count 48.	189

Exhibit No.	Page
17. Three invoices and check for \$356.60 (In Evidence)	191
Count 38.	190
18. Invoice No. 6238, dated Oct. 31, 1944 (In Evidence)	192
Count 49—including Invoices Nos. 6300 and 6221	191
19. Invoice No. 18263, dated Aug. 31, 1944 (In Evidence)	193
Count 47.	193
20. Invoice No. 7073, dated December, 1944 (In Evidence)	173
Count 50—including Invoice No. 7057	193
21. Invoice No. 7456, dated Dec. 20, 1944 (In Evidence)	173
Count 43	194
22. Invoice No. 7251, dated Dec. 12, 1944 (In Evidence)	173
Count 40—including Invoice No. 7267	195
23. Invoice No. 7579, dated Dec. 28, 1944 (In Evidence)	173
Count 44—including Invoice No. 7634	196
24. Several papers including Invoice No. 573, dated Feb. 20, 1945, and Invoice No. 684, dated Feb. 23, 1945 (In Evidence)	173
Count 46.	
25. Invoice No. 8135, dated Jan. 17, 1945 (In Evidence)	173
Count 41.	198
26. Invoice No. 1201, dated March 13, 1945 (In Evidence)	173
Count 45.	199

No. Exhibit		Page
27.	Invoice No. 5110, dated Sept. 12, 1944 (In Evidence)	183
	Count 37.	181
28.	Invoice No. 7413, dated Dec. 18, 1944 (For Identification)	194
	(In Evidence)	217
	Count 42.	200
29.	Group of Invoices (For Identification)	216
	(In Evidence)	226
	Count 1.	217
30.	Letter received Oct. 16, 1945, by Mr. Bircher (For Identification)	234
	(In Evidence)	243
	(From the Acting Commissioner, granting authority for Agent Bircher to testify, etc.)	
31.	A two-page carbon copy captioned "Income Tax Returns," etc. (For Identification)	241
32.	Letter received while Donald Oliver Bircher testified (In Evidence)	244
	(i.e., carbon copy of letter dated Sept. 27, 1945, from U. S. Atty., to Atty. Gen., to secure authority from Comm. of Int. Rev., and reply from Atty. Gen. of Oct. 5, 1945.)	
33.	Signed statement, dated June 15, 1945, by Mr. Segal (For Identification)	246
	(In Evidence)	252
	(In Transcript)	253
	(Offered and limited as to the appellant Segal only. All Counts [R. 302-304].)	
34.	Telegram sent to Mr. Bircher (In Evidence)	286
	(From Commissioner of Internal Revenue, authorizing testimony of Agents Bircher and Phoebus.)	

No. Exhibit	Page
35. Certified copy of income tax returns (In Evidence)	289
(Stillman's return for the year 1944, filed March, 1945.)	
36. Certified copy of income tax returns (In Evidence)	289
(Segal's return for 1944, filed March, 1945.)	
37. Certified copy of income tax returns (In Evidence)	289
(Partnership return of Southern California Meat Co., i.e., Stillman and Segal, for 1944, filed January, 1946.)	
38. Letter received by Samuel Phoebus (For Identification)	292
(In Evidence)	293
(From Acting Commissioner of Internal Revenue, granting authority to Agent Phoebus.)	
39. Book of the Southern California Meat Com- pany No. 2 (For Identification)	293
Count 1.	295
(Broken down into Exhibits 39A, 39B and 39C)	
(Three pages were removed from the "Book"—Government's No. 39 for identi- fication, and received into evidence as Ex- hibits 39A, 39B and 39C.)	
39A. Exchange account page	(In Evidence) 299
39B. Sales, Meat page	(In Evidence) 299
39C. A page headed "No. CR 3"	(In Evidence) 299
40. Certified copy of the order for the continu- ance of the grand jury	(In Evidence) 309

ARGUMENT.

I.

The Indictment Was Valid. An Erroneous Statement In the Caption as Distinguished from the Body of an Indictment Does Not Invalidate Same.

Commencing on page 21 of Appellants' Opening Brief, the contention is urged that the indictment was invalid.

This contention is based on the extreme technical objection that the caption of the indictment, after reciting *September, 1945*, then continued to allege certain facts with reference to February, 1945; whereas, in truth and in fact the "February, 1945," should have been "1946."

A correct reading of the cases cited by appellants and the ones that we shall later refer to indicate that the courts recognize a distinction between an error in the *caption*, as distinguished from the *body* of an indictment.

This is a matter fairly coming within the provisions of 18 U. S. C., Sec. 556 (1946 Edition), pertaining to defects of form in indictments.

We agree with appellants that the *body* of an indictment as distinguished from the *caption* cannot be amended; however, even in the body of an indictment, obvious clerical errors have frequently been held as not fatal.

A case illustrating the distinction between the caption and the body is the following:

Brown v. Hudspeth, 103 F. 2d 958 (C. C. A. 10),

in which case the court held that even erroneous statements of time as to when the offense was committed, was not fatal. In the *Brown* case, petitioner contended that the indictment was void because it was found by the grand jury prior to the date it alleged the commission

of the crime. The caption utilized the allegations the 7th day of April, 1936, whereas, in the charging part of the indictment the offense was charged to have been committed later, namely, on April 29, 1936. The court, in citing many cases in support of its position, held contrary to petitioner's contention and stated as follows:

“The caption is no part of the indictment. It is merely the record of the court and errors therein may be corrected by amendment. The fact that the caption contains an erroneous statement as to the time when the indictment was found is not a fatal defect which vitiates the indictment. The rule has been applied to cases where the caption recited that the indictment was found prior to the date the offense was alleged to have been committed.”

While the Rules of Criminal Procedure were not in effect when this indictment was returned (their effective date having been March 21, 1946), it is believed that even Rule 7 (c) is contrary to the rather technical contention now urged by appellants.

Discussion of Cases Cited by Appellants.

A case appellants rely upon is *United States v. Carney*, 163 F. 2d 784 (C. C. A. 9).

The *Carney* case does not support appellants' position. There, the attempt to amend was to the *body* of the indictment as distinguished from the *caption*. Efforts were made to change an error from “K-14” to “A-14” with reference to an alleged counterfeited gasoline ration coupon. This Circuit recognized on page 790 of the *Carney* opinion, in the cases cited, that there is a distinction between the *caption* and the *body* of the indictment.

On pages 22 and 23 of appellants' brief they refer to the *Johnson* cases. First, the Circuit case of 123 F. 2d 111, which was later reversed by the Supreme Court in the case of *U. S. v. Johnson*, 319 U. S. 503. It is difficult to understand why appellants place such reliance upon these cases. A reading of the Supreme Court *Johnson* opinion, particularly at pages 509 and 510, wherein the court criticized the Circuit and the trial court for its technical holding concerning an order continuing the life of a grand jury which was already conducting an investigation, and in ultimately holding in favor of the government's position, would surely indicate that the rule as announced by the Supreme Court in the latter *Johnson* opinion supports the government's position in this case. As stated, we call attention to the comment made on pages 509 and 510, and will quote but a portion:

"Since the law permits a continuance of the grand jury 'to finish investigations' begun during its original term, the most elementary requirement of attributing legality to judicial action should, unless violence is done to English speech, lead to a reading of the order of February 28 so as to restrict the grand jury to that which it legally could do instead of to an expansive reading making for illegality."

Appellants now argue that jurisdiction is lacking because it is obviously impossible for a grand jury to continue to investigate in the month of February, 1945, a matter they first started in a later month of the same year, namely, September, 1945. This is but an illustration of an extremely technical objection. Good sense—and we are confident appellants' counsel enjoys such—could lead to no other rational conclusion but that there

was a typographical error. February, 1945 should have been 1946.

Where have appellants shown that they were prejudiced by the mistake of inserting "1945," rather than "1946"?

We are quite in accord with the case of *Ex parte Bain*, 121 U. S. 1, but not with the interpretation appellants would give it. From a reading of the *Bain* case, page 8, is noted a recognition of a distinction between the *body* and the *caption* of the indictment. The *Evaporated Milk Association* case is likewise not contrary to the position of the government. In the *Evaporated* case, the investigation by the grand jury of facts which were later made the subject of an alleged crime had not begun before the date of a petition for authority to continue consideration of a grand jury whose term was about to expire. In other words, the ultimate indictment returned in the *Evaporated* case resulted from new facts and not a continuation; or, as the statutes state, "* * * to finish investigations begun but not finished by such grand jury" (28 U. S. C. A. 421).

Appellants fail to indicate other than that the grand jury which brought the instant indictment had not theretofore commenced investigation of facts which resulted in this charge.

Appellants also rely upon the *Edgerton* case, 143 F. 2d 697; however, this case is not in point for there the trial court had attempted to strike from an indictment a portion thereof, a matter which was not permissible until the adoption of the New Rules of Criminal Procedure,

which now the court is empowered to strike that which is surplusage (*i. e.*, Rule 7(c) of Rules of Crim. Proc.). The *Edgerton* case is definitely in point in favor of the government's position, with reference to the recognition that a distinction is recognized between the *body* and the *caption* of an indictment.

"The only apparent qualification to the principle of *Ex parte Bain* consistently accepted, is that to vitiate an indictment the portion deleted must be from the body of the count. *United States v. Fawcett*, 3 Cir., 115 F. 2d 764, 132 A. L. R. 404; *Barnard v. United States*, 9 Cir., 16 F. 2d 451; *Dodge v. United States*, *supra*. But here the portion stricken was clearly within the body of each of the substantive counts, and therefor, in that regard as well, is within the protective scope of the doctrine."

Additional Cases Recognizing a Distinction Between the Body and the Caption of an Indictment.

In the case of

U. S. v. Bornemann, 35 Fed. 824,

the court held that a misrecital in the caption of a date, it reading "1885," for "1888," where from the whole record the error appeared to be merely clerical, is not fatal as the caption is no part of the indictment.

To the same effect :

U. S. v. Clark, 125 Fed. 92 (D. C. Pa.) ;

Lund v. U. S., 19 F. 2d 46 (C. C. A. 8).

In the *Lund* case, by reason of a clerical error, the charge of the offense, even in the body of the indictment, was that it was committed in October, 1925; the information being filed April 8, 1925, correctly the offense should have been charged in October, 1924. The court held that this was not even fatal.

A case holding that an indictment is not invalidated by an obvious error in the repetition of a date, even in the body of an indictment, is that of

Iponnatsu Ukichi v. U. S., 281 Fed. 529 (C. C. A. 9), cert. den. 260 U. S. 729.

Indictments were held good, despite errors existing in same, in the following:

Hogue v. U. S., 192 Fed. 918 (C. C. A. 5).

In the *Hogue* case the charge was perjury before a "clerk" rather than "Court," as intended.

Simmons v. U. S., 18 F. 2d 85 (C. C. A. 8).

In the *Simmons* case it was erroneously charged that the grand jury was sworn in "District Court of Oklahoma," when it should have been "Federal District Court."

Attention is also invited to Government's Exhibit No. 40, a certified copy of the District Court's Order for the Continuance of the Grand Jury. This Order complies with the requirements of 28 U. S. C. A. 421.

II.

Neither the Amendment to the Statute nor the Revision of the Regulation Acted to Terminate the Prosecution Herein.

The Indictment Meets All Enlightened and Modern Conceptions of Tests Required to Properly Inform the Accused of the Elements of the Offense Intended to Be Charged.

Appellants again argue that because the indictment omitted the use of the term "As Amended," with reference to the "Emergency Price Control Act of 1942," and also omitted the term "Revised," with reference to Regulation 169, such entirely invalidates the charge.

In the first place it should be noted that the Act itself, even as late as the citation noted in 50 U. S. C., Appendix, Sec. 946 (1946 Edition), clearly indicates that there is no necessity to refer to the Act in question by adding the phrase "As amended." We quote from the Act itself:

§946. Short title.

"This Act [sections 901-922 and 923-946 of this Appendix] may be cited as the 'Emergency Price Control Act of 1942.' (Jan. 30, 1942, ch. 26, title III, §306, 56 Stat. 37.)"

Where do appellants show that they were prejudiced by the omission of the phrase "As amended?" Such an argument is mere words. A common sense appreciation of realities must govern. The utilization or the absence of phrases which do not cast appreciable enlightenment are not like the talismanic command "Open sesame," the magical command which opened the door of the robbers' den of an Arabian Nights tale of the "Forty Thieves."

We seriously question, and counsel has not shown where he or his clients were taken by surprise by the failure of the indictment to include the phrase "As Amended," or "Revised," with reference to the pertinent regulation.

It should be recalled that this case was tried during the latter part of June, 1946, the verdict being given July 2, 1946. This is not a case that was tried during the early days of "war-time" statutes; nor was it the first of such cases where convictions had been secured. In fact, many affirmations on appeal had been had of like offenses prior to the date of trial of this case.

It is true that the "Emergency Price Control Act of 1942," as initially adopted in January of 1942, was by its terms to have terminated long prior to the date of the offenses charged herein; however, that section of the statute (50 U. S. C. 901(b)) dealing with extensions of the termination date was amended from time to time and the statute was in force and effect at all dates pertinent to the charges contained in this indictment. Reference is invited to the dates of the amendments as noted under Sec. 901(b), Title 50, U. S. C.

Appellants contend that at a later time the Act became "the Stabilization Act of 1944," and that such is not charged in the indictment. It is true (58 Stat. 632) that the Act which went into effect on June 30, 1944, and which covered most of the period charged in this indictment, stated that:

"This Act may be cited as the Stabilization Act of 1944."

However, immediately thereunder we find the following:

“TITLE I—AMENDMENTS TO THE EMERGENCY
PRICE CONTROL ACT OF 1942.”

This case was tried upon the theory of the Act in effect as of the date pertinent to the offenses charged. The instructions given by the court, in reading both from the Act and the Regulations, were from the Act and the Regulations as they existed as to the dates pertinent to the charges. Appellants fail to indicate any place where the Regulations or statutes were improperly defined or read to the jury. Their only complaint is, the case must be reversed because of the omission of the phrase “As Amended,” or “Revised.”

In the appendix to this brief, and likewise in the appendix of appellants’ brief, a portion of Revised Maximum Price Regulation No. 169 is set forth. We have sought to copy the pertinent portions of this Regulation from the Revised Regulation No. 169, that was in effect as of the dates charged.

Let us look at realities. Revised Maximum Price Regulation No. 169, the one pertinent to the charges here contained, was issued December 10, 1942, effective December 16, 1942 (7 Fed. Reg. 10381). An inspection of this Regulation certainly does not indicate that the matter came to an end upon its adoption. It is a rather lengthy Regulation and was amended from time to time in particulars nonsignificant to the complaints now urged. This Revised Maximum Price Regulation 169 contains schedules, des-

ignated certain cuts of meat and what wholesalers could charge for same. It describes zones and exhaustively covers many kindred matters. At the outset of this Revised Regulation 169 is set forth the consideration or the purposes for such Regulation.

As stated, this Revised Regulation was amended from time to time. Such is well known to be the case with almost every "wartime" Regulation; however, appellants have not pointed out—and we are confident they cannot—that this regulation or its amendment was not in effect as of the dates charged. We have read many of the amendments that were later issued but have been unable to find any amendment or regulation that would indicate a substantial repeal as counsel has implied.

As a matter of fact, the Emergency Price Control Act has often been cited as such, without "As Amended:"

Kraus & Bro. v. U. S., 327 U. S. 614 (1946);

U. S. v. Armour & Co., 168 F. 2d 342 (1948) (C. C. A. 3);

Krimm Lumber v. Turney, 163 F. 2d 72 (1948) (Emer. Ct. App.);

Quirk v. U. S., 161 F. 2d 139 (1947) (C. C. A. 8);

Morgan v. U. S., 149 F. 2d 185 (1945) (C. C. A. 5), cert. den. 326 U. S. 731;

U. S. v. Friedman, 50 Fed. Supp. 584 (1943) (D. C. Conn.).

Repeal of a Statute Does Not Affect Existing Liabilities or Crimes.

At several points throughout Appellants' Opening Brief the contention is urged that the Act was not in effect as of the dates charged. There, again, much ado is made over the omission of the words "As Amended," and "Re-

vised.” A mere inspection of the Act reveals that the contention urged is not sound and that assertion is patently in error. 50 U. S. C. 901(b) provides for the date of termination and states:

“* * * except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, *the provisions of this Act and such regulations, orders, price schedules and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability or offense.*” (Italics supplied.)

If the foregoing from the Emergency Price Control Act of 1942 were not of itself sufficient, we call attention to the well established rule that the repeal of a statute does not affect existing liabilities unless the repeal expressly so provides. To this effect, see:

1 U. S. C., §§109 and 110 (formerly 1 U. S. C., §§29 and 29[a]).

To like effect, with respect to a prosecution under this same Emergency Price Control Act, see:

Quirk v. U. S., 161 F. 2d 138 (C. C. A. 8).

To like effect:

U. S. v. Hark, 320 U. S. 531.

In a prosecution under this same Regulation, *i. e.*, 169, and the same Act, the Supreme Court held in the *Hark* case that the revoking of a pertinent provision of a Regulation was not a bar to an indictment for a violation committed when the Regulation was in force.

III.

The Modern Practice of the Federal Courts Is to Consider the Adequacy of Indictments on the Basis of Practical as Opposed to Technical Considerations.

It has been established that for a pleader to set forth that certain facts are in violation of a certain statute neither adds nor detracts from the allegations which alone must measure the sufficiency of such pleading:

Taylor v. U. S., 2 F. 2d 444 (C. C. A. 7), cert. den. 266 U. S. 634.

It has been held that an indictment, to be valid, need not even refer to any particular statute if the facts themselves state an offense:

U. S. v. Brogren, 63 Fed. Supp. 702 (D. C. Mass.).

This Circuit in its more recent opinions has shown a liberal view with regard to sufficiency of indictment. We refer to the following:

Todorow v. U. S., 173 F. 2d 439 at p. 447.

“* * * Modern, Federal criminal pleading, as confirmed by the Rules of Criminal Procedure, sanctions a plain, concise statement, in broad outline, of the offense charged, without particularity as to its details. An information, or indictment, is sufficient to meet modern requirements if it alleges basic facts covering the essential elements of a crime against the United States with enough particularity to fairly apprise the defendant of the nature of the charge and to enable him to protect himself from a subsequent prosecution for the same offense.”

Surely the indictment in the instant case meets all the tests set out in the above and the authorities later referred to.

An inspection of the indictment in the instant case [R. 2 to 26, incl.] will indicate that as to every count, and especially at the outset of each substantive count, the following designation is noted: (50 U. S. C. App. 901, *et seq.*) Such designation can mean only one thing, namely, the law that was effective as of the dates charged in each of the respective counts. Judicial notice can readily be taken, and should be taken, to such amendments without the necessity of express allegations of "As Amended." The reference to a statute certainly carries with it references to any and all of its amendments.

Additional cases supporting the rule that an indictment should be determined on the basis of practical rather than technical considerations are the following:

U. S. v. Bickford, 168 F. 2d 26 (C. C. A. 9).

In the *Bickford* case a perjury indictment was held to be sufficient although it did not directly aver that the officer administering the oath had competent authority to administer same. To like effect:

Flynn v. U. S., 172 F. 2d 12 (C. C. A. 9)
[Perjury];

U. S. v. Ochoa, 167 F. 2d 341 (C. C. A. 9) [Murder];

McCoy v. U. S., 169 F. 2d 776 (C. C. A. 9) [False claims].

An examination of the indictment will illustrate that the conspiracy count (Count 1) is very specific. It charges that the conspiring commenced on or about July 1, 1943,

and continued thereafter until its filing (March 11, 1946). It gave the place; it charged the unlawful conspiring, and then sets forth certain specific paragraphs, from "a." through "k.," alleging not only as to the Emergency Price Control Act of 1942, but also to the therein designated maximum price regulations pertaining to meat, and then followed with several overt acts, namely, from (a) through (r). In the overt acts, dates are mentioned, particular invoices as to their serial number are given, and amounts are designated.

The substantive counts, by way of illustration, Count 2, gave the statutes, the regulation involved, the time and place, the name of the person who had paid to the defendants a sum of money in excess of the maximum ceiling price, the invoice serial number, and the amount per pound of the particular meat product as allowed by the regulations as to the date involved. Count 2 is one of the counts charging the sale for over-the-ceiling price.

As an illustration of a count involving a false entry charge, we refer to one of such counts, namely, Count 12. This count is likewise extremely specific. It is difficult to see how any of such counts could have been more specific unless they had been evidentiary.

This Court recently held, with reference to the sufficiency of an indictment and in sustaining same, in the case of

Nissen v. U. S., 168 F. 2d 846 at p. 849 (C. C. A. 9), Aff. 336 U. S. 613,

as follows:

"This general allegation does not stand alone. It is followed by a detailed description of the means by which the conspirators planned to impede, etc., the

government's inspection functions. Taken in context, it is sufficiently definite to inform the defendants of the charges against them. It shows 'certainty to a common intent' and greater particularity is not required. *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 68."

The correct rule for determining the sufficiency of an indictment is as follows:

The indictment need only be a "plain, concise and definite written statement of the essential facts constituting the offense charged."

Rules of Criminal Procedure, Rule 7(c).

As the Supreme Court said in *Hagner v. United States*, 285 U. S. 427, 431-4 (1932):

"The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States*, 157 U. S. 286, 290; *Rosen v. United States*, 161 U. S. 29, 34."

This indictment clearly meets these tests.

For like authority see

Armour Packing Company v. U. S., 209 U. S. 56,
particularly pages 83 and 84.

This circuit has sustained an information which is substantially similar to the charges herein involved and which likewise involve a violation of Maximum Price Regulation No. 169 (beef, etc.), in violation of the Emergency Price Control Act of 1942. See the following:

Flannagan v. U. S., 145 F. 2d 740 (C. C. A. 9).

Attack on Revised Maximum Price Regulation 169 has been before the Emergency Court of Appeals and decided favorable to the government.

See:

Superior Packing Co. v. Clark, 164 F. 2d 343
(Emer. C. A.);

Ormont v. Clark, 164 F. 2d 354 (Emer. C. A.).

The contentions urged by appellants have been heretofore presented in a rather analogous case.

We refer to:

Kersten v. U. S., 161 F. 2d 337 (C. C. A. 10),
cert. den. 67 S. Ct. 1744.

In the *Kersten* case the Information charged violation of the Emergency Price Control Act, As Amended, while the dates alleged were clearly subsequent to June 30, 1946, at which times said Act had expired but was, shortly after, revived by the Price Control Extension Act of 1946. In the *Kersten* case it was contended that there was error in not charging that such acts were in violation of the

Price Control Extension Act, rather than as charged in violation of the Emergency Price Control Act. The court disposed of the matter far more tersely than we, we regret, have been able to in this brief, by stating at page 339:

“It is true, the caption and body of the information do not refer to the Price Control Extension Act. But, the facts alleged clearly charged a violation of §4, as extended, and the failure to cite the Price Control Extension Act could not have misled Kersten to his prejudice.”

**Reference to a Wrong Statute Does
Not Invalidate an Indictment.**

As noted above, the *Kersten* case illustrates that facts and not designation of names is the controlling factor in consideration of an indictment. In other words, actual prejudice must be shown and must result. This is a practical world and no longer are the courts inclined to heed frivolous complaints based upon overly nice but unprejudicial omissions.

It is well settled that even reference to a wrong statute, whether in the caption of the indictment or in the body, does not void the indictment.

To this effect, see:

Martin v. U. S., 99 F. 2d 236 (C. C. A. 10);

Biskind v. U. S., 281 Fed. 47 (C. C. A. 6), cert.
den. 260 U. S. 731, 28 A. L. R. 1377;

Vedin v. U. S., 257 Fed. 550 (C. C. A. 9).

It has also been held that reference to a wrong statute in an indictment does not invalidate the indictment if the acts charged therein are sufficient to constitute an offense under some other statute of the United States.

To this effect, see:

Capone v. U. S., 51 F. 2d 609 at 616 (C. C. A. 7),
cert. den. 284 U. S. 669;

U. S. v. Hutcheson, 312 U. S. 219 at 229.

“In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States*, 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court.”

Discussion of Certain Cases Noted by Appellants.

Appellants place great reliance upon the case of *M. Kraus*, discussing same on page 34 of their brief and at other places. We feel that this case is not in point and certainly not in support of appellants' position. The *Kraus*

case, 327 U. S. 614, is the one which pertained to “tie-in,” or “combination” sales of chickens. It pertained to Poultry Regulation 269, not the instant Regulation 169. We feel that the language of the *Kraus* opinion definitely supports the validity of RMPR 169, here involved, and points out the distinction or flaw which existed in the Poultry Regulation No. 269. The court pointed out in the *Kraus* opinion that “tying” agreements were not prohibited by the pertinent poultry regulations, and illustrated on page 625 that the Administrator had specifically prohibited the “tying” agreements in the meat regulation, RMPR 169, as amended March 30, 1943, and in other similar such regulations.

Reference on pages 38 and 39 of appellants’ brief, to the *Hutchinson* opinion, 312 U. S. 219, also is not justified. The *Hutchinson* case pointed out that even a wrong reference to a statute in an indictment does not invalidate same if the facts charged are sufficient to constitute an offense. It is difficult to understand how appellants can argue that the facts charged in the instant case are not sufficiently certain. To have gone further would have been to recite evidence. The facts alleged are certainly ample to protect the accused from a charge for the same or a similar offense.

It is difficult to see where appellants find any aid in the *DeJonge* opinion referred to on page 40 of their brief. It is of course well established that convictions cannot be supported upon a charge not made. The *DeJonge* case pertained to the criminal syndicalism law then in existence in the State of Oregon, which was held to be bad as op-

posed to guarantee of free speech and due process assured by the Fourteenth Amendment.

The reference to the *Viereck* case, 318 U. S. 236, is also not to point. The court clearly pointed out, in reversing the conviction had in the *Viereck* case, that the statute did not require registrants to make statements of their activities other than those in which they had been engaged as foreign agents. We fully agree that an indictment must be a clear and concise written statement and sufficiently definite to protect him against a subsequent charge for the same offense. However, where have appellants illustrated to this court any holding so declaring the invalidity of RMPR 169, here involved, or of the Emergency Price Control Act of 1942, likewise here involved?

The *Samuels* case of this Circuit, 169 F. 2d 789, referred to in appellants' brief on page 41, and at other places, is likewise stretching an opinion beyond its announcements. The *Samuels* case is readily distinguishable from the instant case. In the instant case, excepting for the omission of the now contended magical words "As Amended," or "Revised," appellants fail to show where this court improperly charged the jury as to the regulation and statute that was in effect as of the date of the offenses alleged to have been committed. In fact at time of trial, when the government had placed the witness Edward F. Cunningham, the Price Specialist of OPA, on the stand [R. 288-291], counsel representing appellants stipulated with regard to such testimony and, furthermore, raised no

objection to the court's instruction as ultimately given with reference to the price per pound authorized, as will be noted [R. 362].

A different situation existed in the *Samuels* case. No agreement was entered into as to what price was permitted for the whisky involved. In the *Samuels* case three separate statutes were charged to have been violated by reason of the conspiracy. In the instant case no objection appears to have been made to the court's instruction now complained of, with respect to the specific price permitted per pound for the meat in question. Furthermore, this instruction is a correct statement of the law as announced by the relevant regulation. In the *Samuels* case the trial court had erroneously instructed on one of the three laws involved in the conspiracy charged, hence there was no way of determining whether the verdict was based upon a correct or incorrect instruction. The *Samuels* case further discussed the proposition of special and general verdicts.

The court's right to have instructed the jury with regard to the amounts allowed per pound is well established by a similar case of this Circuit also pertaining to Regulation 169, namely, the sale of meat.

To this effect, see:

Flannagan v. U. S., 145 F. 2d 740 (C. C. A. 9).

In the *Flannagan* case this Circuit also held, with regard to the element of intent, that a wilful sale at an excessive price necessarily implies specific intent to sell it (meat at such a price).

IV.

The Court Did Not Err in Refusing to Grant Defendants' Request for a Bill of Particulars.

It has heretofore been pointed out that this indictment was quite specific. It was surely sufficiently definite to inform the defendants of the charges against them.

It is well settled that a bill of particulars is properly denied where the indictment is reasonably definite as to the offense charged. To this effect:

Robinson v. U. S., 33 F. 2d 238 (C. C. A. 9).

And the true rule is, that the discretion of the court in denying a bill of particulars is not reviewable except in a case of abuse of discretion.

To this effect see:

Wong Tai v. U. S., 273 U. S. 77.

Quotations from two opinions which we feel are most appropriate, are the following:

Nyc & Nissen v. U. S., 168 F. 2d 846 at p. 851
(C. C. A. 9), aff. 336 U. S. 613.

“It is elementary, of course, that the denial of a bill of particulars is not ground for reversal if it does not amount to an ‘abuse of discretion.’ *Wong Tai v. United States*, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545. We agree with appellee that the indictment here is an exceedingly specific document, and that no abuse of discretion is shown to have resulted from the trial court’s refusal to compel disclosure of further particulars. Although it may be true that defendants could not have known in advance of trial what various facts and circumstances were to be relied upon by the

government as proof of the alleged conspiracy, this does not necessarily indicate that they were prejudiced by the denial of their motion. The government should not be compelled by a bill of particulars to make a 'complete discovery' of its entire case. *Braatelen v. United States*, 8 Cir., 147 F. 2d 888; *Rubio v. United States*, 9 Cir., 22 F. 2d 766, certiorari denied 276 U. S. 619, 48 S. Ct. 213, 72 L. Ed. 734."

Kempe v. U. S., 151 F. 2d 680 at p. 685 (C. C. A. 8).

"* * * As heretofore shown, the information referred specifically to the regulations and the statutes involved. The purpose of a bill of particulars is to secure facts, not legal theories. *Rose v. United States*, 9 Cir., 149 F. 2d 755, 758; *Flannagan v. United States*, *supra*.

"In *Braatelen, et al., v. United States*, 8 Cir., 147 F. 2d 888, 892, this court said: 'Moreover, a motion for a bill of particulars is addressed to the sound discretion of the court and, unless it is made to appear that this discretion has been abused, the ruling will not be reversed. *Hartzell v. United States*, 8 Cir., 72 F. 2d 569, 575; *Pines v. United States*, 8 Cir., 123 F. 2d 825, 829.'

"We are convinced that the defendant was not lacking as to information of the acts charged to have been committed by him and the regulations and statutes violated thereby. Thus the court did not err in overruling the motion for a bill of particulars."

It is of course well settled that judicial notice is taken of regulations or matters published in the Federal Register. Such publication creates a rebuttal presumption of notice. Such is so declared by statute 44 U. S. C., Sec. 307, and likewise by a similar case of this Circuit involving a prosecution under this same Act and Revised Maximum Price Regulation 169, namely, *Flannagan v. U. S.*, 145 F. 2d 740 (C. C. A. 9).

We have heretofore pointed out that each and every count of this indictment was very specific. To have pleaded more would have been to plead evidentiary facts.

It should be recalled that the defendants were engaged in the wholesale of meat products. Surely, as such, they were aware of regulations pertaining to their industry, especially since their industry had most of its customers within the metropolitan area of Los Angeles. The defendants saw fit not to take the stand; consequently there is no evidence contrary to that offered by the government.

Where have they shown any prejudice from the denial to grant the bill of particulars, for in no place do they state that the court read to the jury regulations or laws that were not in effect as of the dates charged. Their repeated but frivolous charge is: The indictment fails to use "As Amended," with reference to the Act, or "Revised," with reference to the Regulation.

By whatever name you may call them, or whatever adjectives are appended to such law and regulations; they were still equally valid and in existence as of the dates charged and as instructed by the court.

V.

The Evidence Was Entirely Sufficient to Justify the Verdict as to Each Count. The Verdict Was Fully in Accord With the Law.

On page 51 of appellants' present brief there commences the contention that the evidence is insufficient to support the verdict. Here again we see the already well worn contention being repetitiously urged that the indictment charged offenses under the Act and Regulation that were later amended and revised. We feel we have answered these contentions and have shown that no prejudice resulted to appellants from such omission, even though it might have been better practice to have inserted in the indictment the phrase "As Amended," and the term "Revised."

There are certain well-established rules governing appeals. Before discussing in detail certain of the contentions urged by appellants with regard to the contended insufficiencies of the evidence, we feel that it will not be amiss to digress and set forth a few of these principles. They are as follows:

1. Appellate courts will indulge all reasonable presumptions in favor of the trial court and draw all inferences permissible from the record, in determining whether the evidence is sufficient to sustain a conviction.

To this effect:

Henderson v. U. S., 143 F. 2d 681 (C. C. A. 9).

2. Appellate courts will rarely substitute its views on the weight of the evidence for those of the jury, even though the appellate court might have reached a different conclusion.

To this effect see :

Jordan v. U. S., 87 F. 2d 64 at p. 67 (C. A. D. C.).

3. Normally, the sufficiency of the evidence is a jury question. A fairly recent case in support of this proposition, and pointing out that the appellate court is not called upon to weigh conflicting testimony but only to determine whether there was some evidence competent and substantial before the jury, fairly tending to support the verdict, is

Hemphill v. U. S., 120 F. 2d 115 (C. C. A. 9),
cert. den. 314 U. S. 627.

To like effect :

Crumpton v. U. S., 138 U. S. 361.

In view of the above well-settled principles, an analysis of the testimony will clearly show that there was sufficient evidence before the jury to have found the existence of a conspiracy upon the part of both Stillman and Segal. They were both engaged in the same common enterprise. The testimony clearly shows that Segal told several retail meat merchants that they would have to pay a sum of money in excess of the ceiling price; that Stillman did likewise, as to at least one of such merchants, the witness Muehlberger [R. 90 and 93]. The evidence shows that the invoices did not reflect the true price as to those counts pertaining to false entries, and likewise as to the count pertaining to the alteration of the books of the partnership, Count 32.

The evidence also shows that there was the existence of a partnership, first under the name of the Southern California Meat Company No. 2, existing between Stillman and Segal, commencing in August of 1944, and following which an additional partnership existed between Stillman,

Segal and Rosensweig, commencing about January of 1945, under the name of Central Packing Company.

Appellants contend that there is no proof of an unlawful agreement. This Circuit, and others, has repeatedly held that the proof of an unlawful agreement may be had by circumstantial evidence. To such effect see the often quoted case of

Marino v. U. S., 91 F. 2d 691 at p. 694 (C. C. A. 9).

See:

Quirk v. U. S., 161 F. 2d 138 (C. C. A. 8).

In affirming a conspiracy prosecution pertaining to the Emergency Price Control Act of 1942, in the selling of corn in excess of the ceiling price, this broad principle of participation being inferred from the facts and circumstances is again announced.

In a very recent case from this Circuit, this rule is again announced. See:

Nyc & Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9),
aff. 336 U. S. 613.

This Court, on page 852 of the *Nyc & Nissen* opinion, stated as follows:

“The existence of a conspiracy may be inferred from acts of persons which are done in pursuance of an apparent criminal purpose. *Blumenthal v. United States*, 9 Cir., 158 F. (2d) 883, affirmed 332 U. S. 539, 68 S. Ct. 248.

* * * * *

“Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a

defendant with it. *Meyers v. United States*, 6 Cir., 94 F. 2d 433, certiorari denied 304 U. S. 583, 58 S. Ct. 1059, 82 L. Ed. 1545; *Phelps v. United States*, 8 Cir., 160 F. 2d 858. The evidence here is more than slight.”

A case additionally to point is the following:

Braverman v. U. S., 125 F. 2d 283 (C. C. A. 6)
(reversed on other grounds, 317 U. S. 49).

In the *Braverman* case the rule with respect to reasonable inferences that may be drawn from all the facts and circumstances, to show the existence of the conspiracy, is noted in the following language (p. 286):

“The rule of our circuit and others was clearly stated and approved by Mr. Justice Sutherland, retired, with whom sat the present Chief Justice and Circuit Judge Clark in *United States v. Manton*, 2 Cir., 107 F. 2d 834, 839: ‘It is not necessary that the participation of the accused should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances. In passing upon the sufficiency of the proof it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it. *Hodge v. United States*, 6 Cir., 13 F. 2d 596; *Fitzgerald v. United States*, 6 Cir., 29 F. 2d 881.’ ”

It is, of course, well settled that co-defendants may be liable even though they only aid and abet one another. This principle is statutory.

18 U. S. C., Sec. 550 (1946 Edition).

There are many cases construing this point, including the case of *United States v. Pinkerton*, 328 U. S. 640 at p. 647.

This principle is acknowledged in this Circuit in the *Nyc & Nissen* case, 168 F. 2d 846 at p. 854 of the opinion. (Aff. 336 U. S. 613.)

Additional authorities upon the principle of holding joint confederates liable for the acts of the confederate, even under substantive charges upon the theory of aiding and abetting, are the following cases:

Bossa v. U. S., 330 U. S. 160 at p. 164;

Borgia v. U. S., 78 F. 2d 550 (C. C. A. 9), cert. den. 296 U. S. 615;

U. S. v. Olweiss, 138 F. 2d 798 at p. 800 (C. C. A. 2), cert. den. 321 U. S. 744.

**In Answer to Additional Specific Complaints
Raised by Appellants, Discussing the Alleged
Insufficiency of the Evidence.**

We have already covered the point that the evidence was entirely sufficient to have supported the jury's verdict that a conspiracy existed and could logically be inferred to have existed as charged. It should be noted that neither of the appellants testified; they were content to conclude without offering any affirmative evidence. It is well settled that no corroboration need be had of the testimony of an accomplice, if it can be said that the retail merchants who purchased this meat were accomplices. In the federal

courts it is well settled that the testimony of an accomplice alone will support a conviction; and, further, that the court is not compelled—although it is better practice—to give an instruction along this line.

To this effect:

Caminetti v. U. S. 242 U. S. 470 at p. 495;

Hass v. U. S., 31 F. 2d 13 (C. C. A. 9), cert. den. 279 U. S. 865, and

Pine v. U. S., 135 F. 2d 353 at p. 355 (C. C. A. 5), cert. den. 320 U. S. 740.

A rather recent opinion of the Supreme Court supports the proposition that by reason of the aiding and abetting statute, acts committed by one conspirator are attributable to his co-conspirator for the purpose of holding him liable for the substantive offense, and this is true whether the overt acts charged in the conspiracy count were also charged and proved as substantive counts, pointing out that the agreement to do an unlawful act is distinct from the doing of the act.

To such effect:

Pinkerton v. U. S., 328 U. S. 640.

Complaint is urged that there was only one merchant, namely, the witness William Muehlberger, who testified with relation to over-ceiling purchase discussions with the appellant Stillman, and appellants urge that there is no evidence of any conspiracy in his testimony. To this we again reply that even the testimony of one witness concerning such factors is sufficient. The witness Muehlberger stated, in effect, that Stillman told him if he was to secure meat he would have to pay five cents per pound

over the ceiling price [R. 93-95], and that he, the witness, paid such sum over and above the ceiling price. This, coupled with admissions made by Stillman to the witness Namson, in the presence of Segal, wherein Stillman stated that a sum of money reflected on a book of the partnership resulted from bonuses over and above the ceiling price [R. 143], together with the partnership between Segal and Stillman, and other pertinent evidence, was sufficient to support the jury's verdict, especially when there was no evidence to the contrary.

The complaint concerning the testimony of witness Namson, commencing on page 54 and also discussed in other parts of appellants' brief, overlooks the fact that this testimony pertained to admissions voluntarily made by either Segal or Stillman in the presence of Namson, and they were offered as such admissions. To discuss them in detail would be to over-lengthen this reply brief. Counsel complains that testimony of Internal Revenue Agent Bircher (App. Br., p. 55) pertaining to disclosures made by Segal concerning his income tax, is not proof of conspiracy or a declaration in furtherance thereof. To this we fully agree that this does not prove a conspiracy nor was it offered for that purpose. A fair reading of the transcript will clearly reveal that this testimony was offered as to, and was *limited solely* to, the defendant Segal [R. 302-304].

Counsel's reference to the *Krulwicht v. U. S.* case, 336 U. S. 440, does not support his claims. The *Krulwicht* case pertained to a Mann Act prosecution, where the Supreme Court held it was improper to utilize against a co-conspirator standing trial the remarks between a victim and another conspirator occurring six weeks after the transportation. The evidence was not

offered in the *Krulewitch* case as offered here, namely, against the person making the utterance. We are, and of course must be, in full accord with the *Krulewitch* opinion and also its very excellent discussion criticizing the over-use of the conspiracy charge. In other words, the *Krulewitch* case holds that a co-conspirator is not bound by the remarks of a fellow conspirator, occurring after the fulfillment of the conspiracy. It does no violence to the established rule that admissions are always admissible against the person making same.

The *Fiswick* case is also not properly applied. That case holds that a confession or admission of a co-conspirator after his apprehension is not binding on the other, and also that a conspiracy terminated with the last overt act. It is obvious that such opinion does not apply here.

Appellants also argue that evidence was not offered to support each and every one of the matters referred to in the conspiracy count. We need not cite authorities to prove that such is not required. The offense is the conspiracy and an overt act performed in furtherance thereof. Appellants are incorrect when they state that no overt act was proved, as they contend on page 56 of their brief. Without going into all of such overt acts that were established, we specifically call attention that overt act "r" of Count 1, is fully supported by Government's Exhibit No. 9, admitted into evidence [R. 123]. This pertained to the payment by the merchant, witness

Weaver, of over-ceiling sums paid per pound for beef of from five to eight cents per pound. There was no testimony to the contrary.

We concede that no testimony was offered in support of several of the overt acts; however, even the proof of one is sufficient.

Marino v. U. S., 91 F. 2d 691 (C. C. A. 9).

There is also authority to the effect that proof of an overt act in furtherance of a conspiracy, although not charged, is proper.

U. S. v. Negro, 164 F. 2d 168 (C. C. A. 2).

The complaint urged with respect to lack of proof to hold each defendant as to the substantive counts has heretofore also been frequently urged, but it is well established under 18 U. S. C. 550, that a person is liable for an act of his confederate even under a substantive charge, upon the theory of aiding and abetting.

Nyc & Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9), *affd.* 336 U. S. 613.

Appellants also argue that there is no evidence that the defendants, or either of them, made or caused to be made any false entries on the invoices involved; and, further, they urge that the sales records or invoices are not the type contemplated by the regulation which requires the making and retention for inspection of accurate records of each sale. With regard to the proof of the

defendants making such entries we feel the evidence clearly establishes that both appellants, as partners of this concern, caused sales records, a duplicate copy of which was given to the buyer, to reflect the proper selling price, but which records were false and incorrect in that they failed to reflect entirely what was charged to the various merchants, i.e., the side payments.

In the appendix we have set forth a portion of the Revised Maximum Price Regulation No. 169. We now call attention to the portion commencing, "SECTION 1364.407—RECORDS AND REPORTS." A reading of this subdivision of the regulation will clearly reveal that a practical interpretation to be given such regulation is that the wholesaler of beef, veal, etc., shall make and preserve sales records and they shall be accurate, showing the "date," "name and address of the buyer," "quantity, type of cut," "grade," "and the price charged or received or paid therefor."

How the regulation could be any more specific and upon what grounds appellants now challenge same is difficult of comprehension.

Appellants would argue that there is no proof offered that these sales records and books were the kind required to be kept, and that the prosecution failed to produce evidence to that effect. Had any effort been made to have characterized such sales slips and books, counsel would have then objected that such evidence was calling for a conclusion. It is felt that this matter was amply and properly covered by the court's instruction and that

the regulations speak for themselves and fully cover the subject here involved.

Appellants fail to cite a single case supporting their charge that such sales slips and books of a concern have not been held to be the type required by the provision of RMPR 169.

The Contention That the Side Payments Were Tips Is Evasive and Unfounded.

On page 62, appellants repeat the unique contention that the price received over and above the ceiling price for the meat sold was in the nature of "gifts," "tips," or "gratuities," pointing out that they were similar to a tip given to a waiter when presented with a restaurant bill. This contention is so flimsy and unsound that it is hardly worthy of reply. Suffice it to say that each of the witnesses testified that they paid certain specific set prices per pound above ceiling price to one or either of the appellants or other employees, for all meat received and were given to understand if they didn't so pay they wouldn't receive the meat. Tips may often be placed under one's coffee saucer and to that extent be concealed, but there and there alone is there any similarity between the over-ceiling charges demanded and received by the appellants and the contention that they were "gifts" or "tips." The regulations specifically provide that they "shall not be evaded, either by direct or indirect methods" (see appendix to this brief), R. M. P. R. No. 169, Sec. 1364.406.

VI.

The Regulations Were Sufficiently Definite.

On page 63 of appellants' brief the contention is urged that Revised Maximum Price Regulation 169, the one most pertinently involved, is so uncertain it cannot form the basis of any criminal prosecution. Again we note that appellants rely upon the *Krause* case, 327 U. S. 614. We have hertofore pointed out, page 36 of this brief, that the *Krause* opinion approved of the instant Regulation 169 but held invalid the Poultry Regulation 269, because it did not specifically prohibit "tying" agreements as the instant Regulation 169 does.

The validity of the regulation in question has been sustained upon numerous occasions. We have cited many cases to such effect. It has been the subject of attack before the Emergency Court of Appeals and there, too, has been sustained.

See:

Superior Packing Co. v. Clark, 164 F. 2d 343
(Emer. C. A.);

Ormont v. Clark, 164 F. 2d 354 (Emer. C. A.).

Even a stronger answer to this contention is the very Act itself, where Section 204(d) of the Emergency Price Control Act as originally adopted and likewise as amended, or 50 U. S. C. 924(d), specifically provides that no court other than the Supreme Court of the Emergency Court of Appeals has jurisdiction to determine the validity of the regulations. This principle has been noted in the Supreme Court case which specifically dealt with RMPR 169 and sustained its validity to the there attack, namely, in the opinion of—

Yakus v. U. S., 321 U. S. 414 at p. 422.

In the opinion affirmed by the *Yakus* case, namely, *Rottenberg v. U. S.*, 137 F. 2d 850, and which sustained the validity of RMPR 169, it is pointed out that if one wished to challenge such regulation he should have followed procedure provided for in the Act.

VII.

No Error Was Committed Either in Admitting the Income Tax Returns or the Statement Given by One Appellant to the Internal Revenue Agents.

Commencing on page 65, the contention is urged that error existed in admitting in evidence the income tax returns. These consisted of certified copies of returns and are identified in the record as Government's Exhibits 35, 36 and 37.

We shall hereafter cite additional authority in support of their introduction but at the present time we wish to state that we cannot agree with the interpretation that counsel has placed upon the *Greenbaum* case, cited on page 65 of appellants' brief. We respectfully submit that the *Greenbaum* case holds that certified copies of tax returns are admissible. In the instant case, even less objectionable than that noted in the *Greenbaum* case, the returns admitted were Stillman's return for 1944 [Government's Exhibit 35], Segal's return for 1944 [Government's Exhibit 36], and the partnership return of Stillman and Segal for 1944 [Government's Exhibit 37]. It is established that such returns are admissible.

U. S. v. Rollnick, et al., 91 F. 2d 911 (C. C. A. 2), rev. as to defendant Bernan (302 U. S. 11).

Also see:

Steiner v. U. S., 134 F. 2d 931 (C. C. A. 5), cert. den. 319 U. S. 774,

A Similar Such Contention With Respect to Returns and Statements Has Been Rather Recently Decided Adverse to Appellants' Contention.

The above contention is based on this Circuit's opinion in the case of *Shubin v. U. S.*, 164 F. 2d 377 (C. C. A. 9).

The *Shubin* case was tried on an indictment that was substantially the same as the instant indictment. It was likewise tried before the Honorable J. F. T. O'Connor; it was a case that preceded, in point of time, the instant case by but a few days. It likewise involved a conspiracy charge to violate the Emergency Price Control Act of 1942, together with the pertinent Maximum Price Regulations pertaining to meat products. The substantive charges in the *Shubin* case were similar to those involved in the instant case.

Appellants in the *Shubin* case raised similar contentions to those now being urged in the instant case, with respect to the introduction of income tax returns and statements which they had voluntarily given to the agents of the Bureau of Internal Revenue. This Circuit held adverse to the contentions there urged and held that the court ruled correctly in admitting such testimony.

In the instant case attention is invited that the witness Segal voluntarily, and not in response to any subpoena, appeared before an agent of the Bureau of Internal Revenue, on or about June 9, 1945, and gave a statement [R. 246]. He was advised that he was not required to make the statement; that he had a right to be represented by an attorney or an accountant, and apparently freely and voluntarily gave such statement [R. 246], in which state-

ment appellant Segal made certain admissions that were utilized in the instant trial.

This statement was Government's Exhibit 33. The testimony of the Internal Revenue Agent Bircher was only given after full and complete authority had been obtained as is required by 26 U. S. C., Sec. 55, and the pertinent regulations under the Treasury decisions.

It should be noted that this testimony, the statement, was limited as to the appellant Segal [R. 302-304].

Internal Revenue Agent Phoebus gave certain testimony concerning conferences that he had had with the appellants, Stillman and Segal [R. 297 through 308]. Government Agent Phoebus likewise had authority for so testifying.

A case to point is:

U. S. v. Monjor, 147 F. 2d 916 (C. C. A. 3),
cert. den. 325 U. S. 859.

The *Monjor* case holds that Agents of the Bureau of Internal Revenue may testify if they have authority, and that such procedure is not contrary to the Treasury regulations nor in violation of the Fifth Amendment, where it is established that such statement is voluntary.

Appellants contend that the receipt in evidence of testimony of the admissions so made by the appellants violated the Fifth Amendment by compelling them to testify against themselves, and primarily cite in support of their contention *Counselman v. Hitchcock*, 142 U. S. 547. The *Counselman* case is not at point. In that case the witness had been compelled to appear before a grand jury and there refused to give testimony which might tend to incriminate him, since no immunity was guar-

anted. An element of *compulsion* was present in the *Counselman* case. Such is not true here. The record clearly shows that the admissions or statements made by both Stillman and Segal were voluntary and were without any element of compulsion. There was no evidence offered to the contrary. Witness Segal seemed to be anxious to adjust his income tax difficulties even though by so doing he admitted violating ceiling prices established by OPA. He admitted the receipt of sizeable sums of money as "side money" [R. 276, 277 and 279]. Apparently appellants were not concerned with their wilful violations of the OPA law and its regulations but were concerned over their possible tax frauds.

Segal was given an appropriate warning and given the right to refuse to speak or to incriminate himself [R. 246].

In this case we find that all of the requirements were met to allow the United States Attorney to use the documents and testimony of the agents, as is called for by the statute, for official use. There was thus compliance with every provision of the law and regulation, and the information and documents of the Internal Revenue Agents were duly made available to the Government in conformance with legal requirements.

There was precedence for this procedure. We believe that it is sufficient to set forth such cases with but brief comment:

Gibson v. U. S., 31 F. 2d 19 (C. C. A. 9), cert. den. 279 U. S. 866;

Greenbaum v. U. S., 113 F. 2d 113, 126 (C. C. A. 9).

Lewy v. U. S., 29 F. 2d 462, 464 (C. C. A. 7),
cert. den. 279 U. S. 850;

Lewis v. U. S., 38 F. 2d 406 (C. C. A. 9).

In the *Gibson* case the indictment charged a conspiracy to violate the National Prohibition Act. In support of its case the Government there introduced in evidence, over objection, an affidavit made by the defendant six months after the return of the indictment, and which had been delivered to a Deputy Collector of Internal Revenue with the assurance on the part of the Deputy that it would be considered as only bearing on his income tax obligation.

In admitting the testimony with reference to this affidavit, the court pointed out that the Deputy Collector was incompetent to waive such right and held the same admissible, as is indicated on page 22 of the *Gibson* case.

We have indicated that no compulsion was exercised against either of the appellants. It is the opinion of the appellee that the law governing is not that as designated in the *Counselman* case or the *Monia* case, which last mentioned case also referred to testimony given before a grand jury in obedience to a subpoena; but that the law is governed by principles indicated in cases dealing with the distinction between *admissions* and *confessions* and the admissibility of such testimony under such circumstances.

A case sustaining the introduction of *admissions* made to a police officer after the defendant's arrest, even when the defendant appeared to be nervous and jittery and was under the influence of liquor, and was not even warned that such statements might be used against him and had not been charged with any crime, is the case of

Morton v. U. S., 147 F. 2d 28 (C. A. D. C.), cert.
den. 324 U. S. 825.

The *Morton* case clearly recognizes that the rule with regard to the receipt in evidence of admissions is much less onerous than those concerning confessions. After reciting the facts as above noted, the court, on page 31, states as follows:

“* * * Even a confession, given under such circumstances, would have been admissible. The rules governing the reception in evidence of admissions are much less onerous than those concerning confessions. *There was no reason for an instruction as to the difference between an admission and a confession. That was a question of law, not for the jury, but for the trial judge.* There was no reason for an instruction on what constitutes an involuntary confession, because no confession was offered or received in evidence.” (Citing many cases in the footnotes.) (Emphasis added.)

It is thus seen that in the instant case the *admissions* made by appellant Segal, and even the slight admissions made by the appellant Stillman long before the return of this indictment, and made to agents investigating their income tax liabilities, were not in the nature of confessions but were in the nature of admissions; consequently, there was no duty upon the part of the court to have submitted to the jury the instruction as proposed by the appellants, particularly as set forth on pages 89 and 90 of Appellants' Opening Brief.

A reading of the testimony as is reflected in Government's Exhibit 33—the statement of the appellant Segal—will clearly denote that it was not a confession of the crime charged in this indictment; it amounted to attempted explanations of certain moneys he had received as so-called “gifts” from customers paying him sums of money in ad-

dition to the ceiling price on meats sold. It was of a general nature and did not cover any of the specific charges contained in this indictment, this indictment having been filed about nine months later, namely, in March of 1946.

Even though the statements made by appellants Stillman and Segal to the Internal Revenue Agents might be classified as confessions, still, the following authority justifies their introduction.

See:

U. S. v. Bayer, 331 U. S. 532 (particularly on p. 539).

Radovich, one of the appellants who had served with distinction in the Air Forces of the United States Army, was ordered to report to Mitchell Field. He was placed under arrest and confined to the Psychopathic Ward. He was denied callers and communication with others. While under such constraint he made a first confession. This, the Supreme Court held, they would assume was inadmissible. At a later date, Radovich made a second confession to an FBI Agent. At the time of making the second confession he was confined to the Base. He volunteered facts that were not disclosed in the original statement or confession. He was warned that the second statement might be used against him. He requested the original statement—the one that had been taken while he was restricted—and the second one was labeled a supplementary statement and was basically the same as the first. The court permitted the introduction of the second statement although he urged that it was the fruits of the earlier one, and on page 541 of the *Bayer* case stated as follows:

“* * * The second confession in this case was made six months after the first. The only restraint

under which Radovich labored was that he could not leave the base limits without permission. Certainly such a limitation on the freedom of one in the Army and subject to military discipline is not enough to make a confession voluntarily given after fair warning invalid as evidence against him. We hold the admission of the confession was not error. *Cf. Lyons v. Oklahoma*, 322 U. S. 596."

The attitude of the Supreme Court with respect to admissions of guilt and the propriety of receiving such in evidence, and the differentiation from the principles announced in the *McNabb* case, is illustrated in the following:

U. S. v. Mitchell, 322 U. S. 65.

In the *Mitchell* case, admissions made immediately after the arrest were held proper and such statements were not nullified, although after making the statements Mitchell was held for eight days before he was arraigned, the court pointing out that the illegality of the detention does not retroactively change the circumstances under which the disclosures were made.

This Circuit has held, subsequent to the *McNabb* and *Anderson* Supreme Court decisions, that testimony is admissible of statements made by the accused to an FBI Agent before any charges had been filed against the accused, where there was no showing of any mistreatment or anything of a negative nature to their being but free and voluntary.

To this effect:

Cohen v. U. S., 144 F. 2d 984 (C. C. A. 9).

This Circuit has also held that there is no presumption against a confession and no burden upon the Government to establish its voluntary character.

To this effect, see:

Gray v. U. S., 9 F. 2d 337 at p. 339 (C. C. A. 9).

“* * * It is the rule in the federal courts that the fact that a confession is made by an accused person even while under arrest or when drawn out by the questions of an officer does not necessarily render it involuntary. There is no presumption against a confession and no burden upon the government to establish its voluntary character. *Murphy v. United States* (C. C. A.), 285 F. 801, 807; *Sparf v. United States*, 156 U. S. 51, 55 S. Ct. 273, 39 L. Ed. 343; *Perovich v. United States*, 205 U. S. 86, 91, 27 S. Ct. 456, 51 L. Ed. 722.”

Even where a defendant denies his guilt and he makes exculpatory statements, such statements are admitted as admissions and the cases hereunder noted point out that the rule with regard to reception of admissions is less onerous than those concerning confessions.

To this effect:

Ercoli v. U. S., 131 F. 2d 354 at p. 356 (C. A. D. C.);

Beck v. U. S., 140 F. 2d 169 (C. A. D. C.).

It is therefore submitted that the testimony containing admissions upon the part of appellants was clearly admissible. This testimony, including the statement given by Segal, was not in the nature of confessions but rather that of admissions that had been voluntarily made.

The Disclosure of Admissions and Statements Given to the Bureau of Internal Revenue Was Not Contrary to Any Constitutional Rights of the Appellants.

It should be noted, and there is no contrary evidence, that the statement given by the appellant Segal was free and voluntary. No compulsion was exercised upon him. This testimony was limited as to Segal [R. 302-304].

The cases that counsel cited as noted on page 67 of appellants' brief are not in point. In *Counselman v. Hitchcock*, 142 U. S. 547, the witness had been compelled to appear before a grand jury and there refused to give testimony which might tend to incriminate him, since no immunity was guaranteed. An element of compulsion was present in the *Counselman* case.

In the *Monia* case, 317 U. S. 424, a person testified in obedience to a subpoena. Thus again compulsion existed.

The *Feldman* case gives little support to appellants' contention. That case deals with a mail fraud "kiting" of checks, and the Supreme Court held that the rights of *Feldman* were not violated although testimony he had been compelled to give in a State court was used against him in a Federal prosecution. There was no evidence that Federal Agents had participated in the State proceeding.

In the instant case, when Segal gave his statement which was reduced to writing and which he signed a few days after he had given it [namely, Government's Exhibit 33], or when he or Stillman talked to Internal Revenue Agents, they apparently did so of their own volition.

It has been held that a voluntary extra-judicial admission is admissible notwithstanding that the accused was not warned that his statement might be used against him.

U. S. v. Heitner, 149 F. 2d 105, 107 (C. C. A. 2),
cert. den. 326 U. S. 727;

Himmelfarb v. U. S., F. 2d (C. C. A. 9)
(June 3, 1949).

A case to point is that of

Shapiro v. U. S., 335 U. S. 1.

In the *Shapiro* case and in obedience to an administrative subpoena the accused first produced sales records he was required to keep under "OPA," but when he so appeared he claimed his constitutional privilege. Later, he was prosecuted for violation of the Emergency Price Control Act based upon evidence he so produced. Although the Emergency Price Control Act adopted the immunity provisions of the Compulsory Testimony Act of 1893, the court held that such did not give him immunity from prosecution of making tie-in sales in violation of regulations under the Emergency Price Control Act.

Another interesting point of the *Shapiro* case is the language of the Supreme Court on page 3 thereof, namely, at the very outset the Supreme Court omits utilizing the phrase appellants now so strongly urge should have been inserted in this indictment, namely, "As Amended," when it refers to the Emergency Price Control Act. This is more singular inasmuch as in the *Shapiro* case the Emergency Price Control Act had been amended at least twice prior to the date of the issuance of the subpoena of September 29, 1944, requiring Shapiro to produce the records there involved.

Under separate headings appellants have made similar such objections to the introduction of these returns and the statement given; however, we feel that such contentions are untenable and have been amply answered.

VIII.

No Error Existed With Respect to Exhibit No. 39.

It is our opinion that counsel for appellants is mistaken in the assertion at page 71 of appellants' brief, that Exhibit No. 39 (a book which was ordered withdrawn) remained in evidence or was submitted to the jury. If we recall the transcript—and we believe we do—the correct statement concerning Exhibit No. 39, namely, one of the record books of the Southern California Meat Company, is that it was first marked for identification [R. 293]. Later during the testimony concerning this book certain sheets were abstracted from it and they became Government's Exhibits 39(a), 39(b), and 39(c). These last mentioned sheets from Book 39 were identified and received into evidence [R. 299].

IX.

No Error Existed in the Admission of Exhibits 10 and 11, Testified to by the Witness Samuel Namson.

Exhibit 10 was seven sheets from the "general ledger" of the partnerships operated by the appellants, namely, the Central Packing Company, and Exhibit 11 was four sheets from the same book. Witness Namson testified concerning certain admissions or statements that had been made by Stillman or Segal, or by one or either of them in the presence of each other, when they had talked with him concerning Looks of the Central Packing Company from which

Government's Exhibits Nos. 10 and 11 were a part. This testimony commences [R. 139] and pertained to certain entries that were not correct and wherein admissions had been made concerning money appellants had accumulated from the sale of meat, from bonuses over and above ceiling prices [R. 143]. It is believed that a reading of the transcript will clearly reflect that sufficient admissions and identification were made by the appellants to Namson, to lay a foundation for the introduction of the exhibits now complained of.

It should be observed that there was no testimony contrary to that given by witness Namson.

X.

Proper Foundations Were Laid for the Admission of All Books and Records Received in Evidence.

Commencing on page 75 of appellants' brief, complaint is made that no proper foundation was laid for the introduction of Exhibits 39(a), 39(b), and 39(c). These books were originally a part of Exhibit No. 39, for identification, a book of the partnership Southern California Meat Company No. 2. This book had been handed to Internal Revenue Agent, the witness Phoebus, when he had talked with Stillman in April of 1945, it having been handed to him in response to his request to look at their books [R. 294, 295 and 297].

It is thus seen that sufficient admissions were made as to the character of the books by one of the persons involved, from which the jury could infer that such books were

books maintained by the partnership of the appellants Stillman and Segal.

Even though the objection concerning lack of foundation, as announced by the “regular entry rule” of 28 U. S. C. A. 695 [1946 Ed.] might apply, it, too, was met in this case.

A like objection under similar circumstances was made to the introduction of books and records in *Ilseng v. U. S.*, 130 F. 2d 823 at p. 826 (C. C. A. 9), cert. den. 314 U. S. 665, wherein the court held there was a sufficient showing to justify their admissibility.

In an analogous situation involving the violation of M. P. R. 169, the court rejected the contention that such books were not kept in the regular course of business.

See, to this effect:

Zimberg v. U. S., 142 F. 2d 132 (C. C. A. 1), cert. den, 323 U. S. 712.

We repeat that all of such exhibits, or books of the partnership concern, were properly identified by direct admissions, and that the objections urged at trial, or presently, go to the weight rather than to the admissibility of such documents.

XI.

**No Error Existed in the Instructions Given or in
Rejecting Those Urged.**

Commencing on page 80 of appellants' brief the contention is now urged that error existed in the instructions given. Here, again, and for several pages we see the complaint that the court read from the Emergency Price Control Act "As Amended," and from R. M. P. R. 169, as "Revised." It is felt that we have heretofore answered these contentions and that there is no merit to this overly nice argument.

Appellants fail to show wherein the instructions read were contrary to the law and regulation in effect as of the dates when the offenses were alleged to have been committed.

On page 81 the appellants assert a rather novel complaint to the effect that the court should not have instructed as to the highest price allowable for the meat in question as of the dates charged. This complaint is particularly unique in that our search of the record fails to reveal that any objection was made to this instruction. We are referring to the instruction reflected on page 362 of the transcript. Furthermore, it will be seen that counsel virtually stipulated to this instruction when he made no objections to what the OPA Price Specialist, Cunningham, would be able to testify to as is reflected [R. 288-291].

No magic lurks in the phrase "As Amended," or "Revised." The court did instruct this jury in accordance with the law and regulations applicable as to the dates involved.

On page 84, appellants complain that the court failed to define what document or record was required to be

kept under the law, the contention being urged that there is nothing in the regulations to define what type of records were required to be kept. Here, again, quibbling is indulged in. Surely no aid would be had in reading more to the jury than is reflected in the regulation itself, namely, that portion of R. M. P. R. No. 169, "SECTION 1364.407—RECORDS AND REPORTS." The court read this portion of the regulation to the jury [R. 368]. Could it have been more specific?

No confusion was had in that at one time the court would refer to the pertinent Act and omit to use the phrase "As Amended," and then at other times insert the phrase "As Amended," in his instructions. We have heretofore pointed out how the Supreme Court itself, in a comparatively recent case and a case which was decided under the Emergency Price Control Act of 1942 (As Amended), did, within the first sentence of that opinion refer to the Act without utilizing the term "As Amended," although at the time in question the Act had been amended at least two times prior to the pertinent dates there involved.

To this effect, see:

Shapiro v. U. S., 335 U. S. 1 at p. 3.

At page 86, appellants endeavor to find consolation in this court's recent opinion of *Samuel, et al. v. U. S.*, 169 F. 2d 787.

As we have heretofore stated, the *Samuel* case is readily distinguishable on the instructions, from the instant case. In fact, the only similarity between the instant case and the *Samuel* case is that they both involved, at least in part, violations of the Emergency Price Control

Act. In passing, it should be noted that even this Circuit in the *Samuel* case, although this Act had been amended prior to the dates of the alleged offense, referred to the Act without utilizing the term "As Amended" (see p. 789 of *Samuel* opinion). The distinguishable feature between this case and the *Samuel* case is that in the instant case no speculation was required in that no objections were even voiced; even the contrary existed by reason of the stipulation, namely, the price permitted to be charged for the meat in question was definitely established by regulation and the court properly so instructed without objection upon the part of appellants. Whereas, in the *Samuel* case, by reason of the type of whisky involved, there was uncertainty as to the maximum price fixed or allowed. This court, on page 792 of its opinion, stated:

"* * * It was the law that before the whiskey could be sold legally, a maximum price must be fixed. It will be seen that so far as shown none was fixed for the whiskey in suit. The court then gave an erroneous formula for ascertaining the maximum wholesale price for whiskey."

In a summation of its views in the *Samuel* case, a clear distinction is had as will be noted on page 798 thereof.

"Summarizing our conclusion is: The judgment must be and is reversed because it rests upon a general verdict which may have been found upon the jury's conclusion that a conspiracy existed to violate any one, any two, or all of three United States laws, set up in one count, one of which was erroneously defined to the jury, and such erroneously defined law was so closely connected with both of the other laws in the alleged conspiracy as to affect the decision upon them

to the reversible prejudice of all defendant-appellants.”

Another objection that appellants now raise, commencing page 87 of their brief, is the court's instruction that the jury decided the case upon the law effective as of the dates involved, although the Emergency Price Control Act, As Amended, had expired on June 30, 1946. Appellants again contend that the termination of the Act barred prosecution for offenses committed when the Act was in effect. This is obviously an unsound and unwarranted argument and is contrary to the Act itself. 50 U. S. C. App., Sec. 901(b) provides for a savings clause even after the expiration of the Act. Such is also the general law by reason of the Code provision which provides that even the repeal of the statute does not affect existing liabilities unless the repeal expressly so provides.

To this effect:

1 U. S. C., Secs. 29 and 29(a), but now U. S. C., Secs. 109, 110.

There Was No Error in Refusing to Give the Instruction Requested, Concerning the Voluntary or Non-voluntary Character of a Statement Given by One of the Appellants.

On page 89 of appellants' brief, counsel set forth an instruction which the court refused. This instruction concerned whether or not the statement given by Segal to the agents of the Bureau of Internal Revenue was voluntary or not. In view of the record there was no occasion for giving such an instruction.

In the first place there was no testimony to offset the *prima facie* voluntariness of the statement. No one re-

futed the language of the signed statement or the witness who testified to its voluntary character. Furthermore, appellants do not concede that it was a confession; in fact, in many respects it was more in the nature of an exculpatory statement although it did contain certain admissions.

At another point in this brief, commencing page 59 we have endeavored to set forth the law with respect to the distinction between confessions and admissions and feel that such authorities support the position we now urge.

In addition, attention is invited to a recent opinion of this Circuit, namely,

Himmelfarb, et al. v. U. S., F. 2d (C. C. A. 9), June, 1949.

We quote from certain of the opinion as follows:

“* * * Voluntary admissions, or indeed voluntary confessions, may be received in evidence against the giver without proof of warning.”

It seems well established that an admission is admissible in evidence notwithstanding that the accused was not previously warned that his statement would be used against him. To this effect:

U. S. v. Heitner, 149 F. 2d 105 (C. C. A. 2).

The cases relied upon by appellants in support of their position, such as the *Lisenba*, referred to on page 90 of their brief, are instances where a person is in custody previously charged with a crime, or circumstances where there is some conflict as to the voluntary character of the statement received. The contrary was the case here.

A case that is controlling and adverse to appellants' contention is:

Morton v. U. S., 147 F. 2d 28 (C. C. A., D. C.),
cert. den. 324 U. S. 875.

**It Is Well Settled That Instructions
Must Be Taken in Their Entirety.**

A reading of the instructions given will illustrate that they amply and fully covered all essential elements involved and fully protected the rights of the appellants. The instruction given with regard to the price allowable for the meat in question is supported by a closely analogous case likewise pertaining to the sale of meat at over-ceiling prices, namely, *Flannagan v. U. S.*, 145 F. 2d 740 (C. C. A. 9).

It is well settled that instructions must be considered in their entirety and that if the entire instructions cover all essential elements, no prejudice results. To this effect see:

U. S. v. Sorcey, 161 F. 2d 899 (C. C. A. 7);

Taylor v. U. S., 142 F. 2d 808 at p. 817 (C. C. A. 9), cert. den. 323 U. S. 723.

To the same effect:

Hargreaves v. U. S., 75 F. 2d 68 at p. 73 (C. C. A. 9), cert. den. 295 U. S. 759.

"It is well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. *Colt v. U. S.*, 190 F. 305, 308 (C. C. A. 8); *Michael v. U. S.*, 7 F. 2d 865, 866 (C. C. A. 7)."

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. U. S., 135 F. 2d 353 at p. 355 (C. C. A. 5),
cert. den. 320 U. S. 740.

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. U. S., 132 F. 2d 538 (C. C. A. 9), cert.
den. 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction. To this effect:

Roubay v. U. S., 115 F. 2d 49 (C. C. A. 9).

Conclusion.

It is respectfully submitted that there was substantial evidence supporting the verdict of guilty, of the appellants, on the counts of which they were found guilty.

No error of a reversible nature occurred at the trial.

In view of the foregoing, and in view of the contentions urged in this, Appellee's Reply Brief, it is respectfully submitted that the verdict and judgment as to both of the appellants should be affirmed.

JAMES M. CARTER,

United States Attorney;

ERNEST A. TOLIN,

Chief Assistant U. S. Attorney;

NORMAN W. NEUKOM,

Assistant U. S. Attorney,

Chief of Criminal Division,

Attorneys for Appellee.

APPENDIX.

Maximum Price Regulations Nos. 148, 169 and 239 are price regulations issued pursuant to the Emergency Price Control Act of 1942.

Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts. Maximum Price Regulation No. 148 deals with dressed hogs and wholesale pork cuts. Maximum Price Regulation No. 239 deals with lamb and mutton carcasses and wholesale cuts.

Revised Maximum Price Regulation No. 169 in part provides (7 Fed. Reg. 10381, as amended, issued December 10, 1942, effective December 16, 1942):

"Section 1364.406. Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *

"Section 1364.407—Records and Reports. * * *

"(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for

inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and the weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor. * * *"

"Section 1364.401. Prohibition against selling beef and veal carcasses and whole cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive [33] any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *"

There are in effect substantially similar provisions in Revised Maximum Price Regulations 148 as to pork, and 239 as to lamb, except that under Revised Maximum Price Regulation 148 there is no evasion provision such as above, and the record keeping provision is in different terms. The substance of the regulation is that certain records must be kept including such as are involved in this case and that they must be truthful and cannot be wilfully made false.

JOHN K. NORTHROP, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

and

INEZ H. NORTHROP, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Witnesses for Petitioners:

Barnes, Carl L.

—direct	129
—cross	132
—redirect	134

Bateman, Henry M.

—direct	179
—cross	191

Witnesses for Petitioners: (Continued).

Hahn, Justus A.

—direct 198

Lester, B. P.

—direct 135

—cross 151

—redirect 175

—recross 178

Monson, Claude M.

—direct 86

—cross 102

—redirect 119, 127

—recross 123, 127

APPEARANCES

For Taxpayer:

MAYNARD J. TOLL, Esq.,
RUSSELL S. BOCK, Esq.,
SIDNEY N. WALL, Esq.,
GEORGE F. ELMENDORF, Esq.

For Commissioner:

R. E. MAIDEN, Esq.

Docket Nos. 5041-5042

JOHN K. NORTHROP,
INEZ H. NORTHROP,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1944

May 22—Petition received and filed. Taxpayer notified. Fee paid.

May 22—Request for Circuit hearing in Los Angeles filed by taxpayer. 5/27/44 granted.

May 23—Copy of petition served on General Counsel.

Jun. 24—Answer filed by General Counsel.

1944

Jun. 28—Copy of answer served on taxpayer—Los Angeles, Calif.

1946

Jan. 16—Notice calendar call Feb. 11, 1946, at Los Angeles, Calif.

Mar. 1—Transcript of hearing of Feb. 11, 1946, filed. Case remains on Los Angeles Calendar.

Sep. 11—Hearing set November 4, 1946, at Los Angeles, Calif.

Nov. 12, 13—Hearing had before Judge Hill on merits. Motion of counsel to consolidate dockets 5039 to 5046 inclusive granted. Stipulation of facts filed. Entry of appearance of Sidney N. Wall and George F. Elmendorf as counsel filed at hearing. Briefs due Dec. 30, 1946—replies Jan. 29, 1947.

Dec. 17—Motion for extension to Jan. 16, 1947, to file opening briefs and Feb. 15, 1947, to file reply briefs filed by both parties. 12/18/46 granted.

1947

Jan. 14—Motion for extension to Feb. 3, 1947, to file briefs and March 5, 1947, to file reply briefs filed by General Counsel. 1/15/47 granted.

Jan. 30—Brief filed by taxpayer.

Feb. 3—Brief filed by General Counsel.

1947

Feb. 20—Motion for extension to March 20, 1947, to file reply brief filed by taxpayer. Granted.

Mar. 19—Reply brief filed by taxpayer. 3/19/47 copy served.

Mar. 20—Memorandum reply brief filed by General Counsel.

Apr. 9—Findings of fact and opinion rendered, Hill J. Decision will be entered under Rule 50. 4/10/47 copy served.

May 5—Motion for review by the Full Court filed by taxpayer. 5/8/47 denied.

Jun. 11—Computation for entry of decision filed by General Counsel.

Jun. 16—Hearing set July 16, 1947, at Washington, D. C., under Rule 50.

Jun. 16—Consent to settlement filed by taxpayer. [1]

Jun. 18—Decision entered, Hill J. Div. 2.

Sep. 15—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, filed by taxpayer.

Sep. 25—Proof of service filed.

Sep. 29—Application for consolidation of causes (Docket 5041-42) for the purpose of sending up a single consolidated record on review—with endorsement from the Circuit Court thereon and affidavit of service filed.

1947

- Sep. 29—Application for transmittal of original exhibits from Tax Court with endorsement from Circuit Court thereon and affidavit of service thereon filed.
- Sep. 29—Notice of granting of application for consolidation of causes and of application for transmittal of original exhibits from the Tax Court filed by taxpayer with affidavit of service thereon.
- Oct. 20—Statement of points with affidavit of service by mail thereon filed by taxpayer.
- Oct. 20—Designation of record with affidavit of service by mail thereon filed by taxpayer.
- Oct. 31—Notice granting of application for extension of time for transmitting record on review for 30 days filed by taxpayer with affidavit of service thereon.
- Nov. 3—Certified copy of order from 9th Circuit granting application for extension of 30 days for transmitting record on review filed. [2*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 5041

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PAK) dated February 24, 1944, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 3750 West Crestway Drive, Los Angeles 43, California. The return for the period here involved was filed with the Collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was presumably mailed to the petitioner on February 24, 1944. [5]

3. The tax in controversy is income tax for the calendar year 1940, in the amount of \$99,479.05, which is the total deficiency asserted by the Commissioner.

Assignment of Error

4. The determination as set forth in the said notice of deficiency is based upon the following error:

(a) The Commissioner erred in including in petitioner's income for 1940 the amount of \$168,265.63 as petitioner's community one-half of the "fair market value" of 15,384 shares of Class A stock and 38,461 shares of Class B stock of Northrop Aircraft, Inc., said to have been received by the petitioner in 1940 as compensation for services rendered in connection with the organization of that corporation.

Facts

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) The petitioner was one of the promoters of Northrop Aircraft, Inc., a California corporation engaged in the manufacture of aircraft, and has been the president and a director of the corporation since its inception. He is a well-known aircraft engineer and designer.

(b) Northrop Aircraft, Inc., was incorporated under the laws of California on March 7, 1939. On June 15, 1939, the California Corporation Commissioner issued a permit authorizing [6] the company to sell and issue certain of its securities, including the Class A Common and Class B Common shares referred to hereinafter.

(c) On June 17, 1939, petitioner entered into an agreement with Northrop Aircraft, Inc., whereby the latter was to issue to him not exceeding 24,615 shares

of Class A Common Stock and 61,538 shares of Class B Common Stock in consideration for the use of his name, his past promotional services and his entering into a contract whereby he was to be employed by the company for a term of five years as the person in charge of engineering and design. The agreement provided that petitioner was to become entitled to Class A and Class B shares as Class A shares were sold to the public for cash and in proportion to such sales as follows:

One Class A share for each 16.25 Class A shares sold for cash

One Class B share for each 6.5 Class A shares sold for cash

Said agreement further provided that 60% of the Class B shares issued to petitioner should be subject to an option in favor of the company at twenty-five cents per share, conditioned upon the death of petitioner or his discharge for cause prior to the expiration of the five-year employment contract. The agreement further provided for a release of one-third of these optioned shares at the end of each of the last three years of a five-year period beginning August 1, 1939. Sixty per cent of Class B shares received by petitioner amounted to approximately 23,077 shares.

(d) Following is a schedule showing the dates on which stock was sold by Northrop Aircraft, Inc., for cash, and the amounts of stock to which petitioner became entitled on such dates in accordance with the agreement described above:

Stock Issuance

	Class A	Class B
1939		
7-21	4,415	11,037
7-24	113	283
7-31	1,933	4,833
8-15	123	307
8-23	153	384
8-28	201	504
8-29	123	307
8-30	798	1,995
9-11	153	384
9-12	246	615
9-20	307	769
9-28	659	1,649
9-29	771	1,927
10- 3	307	769
10-24	53	133
10-27	511	1,278
10-28	461	1,153
11- 1	615	1,538
11- 6	769	1,923
11- 8	769	1,923
11- 9	461	1,153
11-13	307	769
11-15	153	384
11-27	107	269
11-28	865	2,164
11-28	Adjustment for fractional shares	11
	<hr/>	<hr/>
	15,384	38,461

(e) The Corporation Commissioner's permit authorizing issuance of shares provided that all certificates evidencing any of the shares issued to petitioner (and other promoters) should be deposited with an escrow holder, to be held [8] by such holder until an order for release was given in writing by the Commissioner. The permit further provided that no sale or transfer of the stock held in escrow could be

made without the written consent of the Commissioner.

(f) The Corporation Commissioner's permit further required as a condition of the issuance of shares to petitioner that he (with other promoters) agree as owner of Class A and Class B shares to waive his right to participate in any distribution of assets of Northrop Aircraft, Inc., while the stock was in escrow, until all shareholders who had paid cash or the equivalent for their stock had received the return of the full amount of the issuance price.

(g) The Corporation Commissioner's permit further required as a condition of issuance of shares to petitioner that he (with other promoters) agree as owner of Class A and Class B shares to waive his right to the payment or accrual of any dividends while the shares were in escrow.

(h) It is customary for the California Corporation Commissioner to require stock issued for promotional services or similar consideration in speculative enterprises to be placed in escrow and held there until such time as the corporation's business and financial position have become reasonably well established.

(i) Neither the Class A shares nor the Class B shares to which this proceeding relates had any fair market value at any time during the year 1940. [9]

(j) Petitioner's returns are filed on the basis of cash receipts and disbursements.

(k) The certificates evidencing title to petitioner's shares amounting to 15,384 of Class A and 38,461 of Class B were issued in his name on March 4, 1940,

and placed in escrow with the Bank of America, Los Angeles, California, on the same day.

(1) The Class A shares issued by Northrop Aircraft, Inc., had the full rights ordinarily attributable to common shares, and were designated Class A to distinguish them from the Class B shares, which had a secondary status in relation to the Class A shares. Under the articles of incorporation, the Class B shares were to become convertible to Class A shares if a specified amount of profits was earned during a period of five years from August 1, 1939. Said Class B shares did not become so convertible during 1940. None of the shares issued to petitioner were released from escrow in 1940 except 5,240 Class A shares which were so released on November 19, 1940.

(m) Upon examination of petitioner's 1940 return the Commissioner added to income an amount of \$168,265.63 representing petitioner's community one-half of the claimed value of 15,384 shares of Class A stock and 38,461 shares of Class B stock, all priced at \$6.25 per share. [10]

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that

(A) Petitioner realized no income in 1940 from receipt of stock of Northrop Aircraft, Inc.

(B) There is no deficiency due from petitioner for the year 1940.

/s/ MAYNARD J. TOLL,

/s/ RUSSELL S. BOCK,

Counsel for Petitioner. [11]

State of California,
County of Los Angeles—ss.

John K. Northrop, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or has had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

/s/ JOHN K. NORTHROP.

Subscribed and sworn to before me this 13th day of May, 1944.

(Seal) /s/ MARGARET C. BATEMAN,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires August 13th, 1947.

I hereby certify that the foregoing is a true copy of the petition to The Tax Court of the United States signed by me on May 16, 1944.

/s/ MAYNARD J. TOLL,
Counsel for Petitioner. [12]

EXHIBIT "A"

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of
Internal Revenue Agent in Charge
Los Angeles Division

LA:IT:90D:PAK

February 24, 1944

Mr. John K. Northrop
3750 West Crestway Drive
Los Angeles, California

Dear Mr. Northrop:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1940, discloses a deficiency of \$99,479.05 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are re-

quested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

HAROLD N. GRAVES,

Acting Commissioner,

By GEORGE D. MARTIN,

Internal Revenue Agent in Charge.

Enclosures: Statement; Form of waiver. [13]

STATEMENT

LA:IT:90D:PAK

Mr. John K. Northrop,

3750 West Crestway Drive, Los Angeles, Calif.

Tax Liability for the Taxable Year Ended

December 31, 1940

Year	Liability	Assessed	Deficiency
1940	\$101,041.53	\$1,562.48	\$99,479.05

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated April 30, 1942, and April 30, 1943, to your protest dated July 15, 1943, and to the statements made at conferences held on November 5, 1943, and December 20, 1943.

A copy of this letter and statement has been mailed to your representative, Mr. Russell S. Bock, 548 South Spring Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustment to Net Income

Net income as disclosed by return.....	\$ 13,002.24
Additional income and unallowable deductions:	
(a) Fair market value of stock received as compensation	168,265.63
(b) Legal expense	482.75
(c) Adjustment of dividends from Northhill Company, Inc.	2,745.28
<hr/>	
Total	\$184,495.90
Additional deduction:	
(d) Loss on worthless stock.....	1,252.50
<hr/>	
Net income adjusted	\$183,243.40

Explanations of Adjustments

(a) During the taxable year 1940 you received 15,384 shares of Class A stock and 38,461 shares of Class B stock of Northrop Aircraft, Inc., as compensation for services rendered in connection with the organization of that corporation. It has been determined that each class of stock had a fair market value of \$6.25 per share when received by you.

Accordingly, there is added to your income the amount of \$168,265.63 representing one-half of the fair market value of the shares of stock received by you, taxable as community income, and computed as follows:

15,384 shares of Class A stock at \$6.25 per share.....	\$ 96,150.00
38,461 shares of Class B stock at \$6.25 per share.....	240,381.25
<hr/>	
Total	\$336,531.25
One-half added to your income.....	\$168,265.63

(b) Legal expense of \$482.75 has not been substantiated as being a proper deduction under section 23(a) of the Internal Revenue Code.

(c) The amount of taxable dividends received from the Northill Company, Inc., has been increased from \$1,047.80 reported by you to the correct amount of \$3,793.08.

(d) A loss of \$1,252.50 is allowable upon your investment in the capital stock of Air Balance Instrument Company becoming worthless during the taxable year.

Computation of Alternative Tax

Net income adjusted	\$183,243.40
Plus: Net long-term capital loss.....	24.00
<hr/>	
Ordinary net income	\$183,267.40
Less: Personal exemption	\$ 200.00
Credit for dependents	1,600.00 1,800.00
<hr/>	
Balance (surtax net income).....	\$181,467.40
Less: Earned income credit	1,400.00
<hr/>	
Net income subject to normal tax.....	\$180,067.40
Normal tax at 4% on \$180,067.40.....	\$ 7,202.70
Surtax on \$181,467.40	84,660.44
<hr/>	
Partial tax	\$ 91,863.14
Minus: 30% of net long-term capital loss....	7.20
<hr/>	
Alternative tax	\$ 91,855.94

Computation of Tax

Net Income Adjusted		\$183,243.40
Less: Personal exemption	\$ 200.00	
Credit for dependents	1,600.00	1,800.00
		<hr/>
Balance (surtax net income)		\$181,443.40
Less: Earned income credit		
(10% of \$14,000.00)		1,400.00
		<hr/>
Net income subject to normal tax		\$180,043.40
Normal tax at 4% on \$180,043.40	\$ 7,201.74	
Surtax on \$181,443.40	84,646.03	
		<hr/>
Total normal tax and surtax		\$ 91,847.77
Alternative tax		\$ 91,855.94
Defense tax (10% of \$97,855.93)		9,185.59
		<hr/>
Total income tax		\$101,041.53
Correct income tax liability		\$101,041.53
Income tax assessed:		
Original, account No. 203981	\$ 997.70	
Additional, July, 1942, 510116	564.78	
		<hr/>
Total income tax assessed		1,562.48
		<hr/>
Deficiency of income tax		\$ 99,479.05

[Endorsed]: T.C.U.S. Filed May 22, 1944.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that the notice of deficiency involved herein was mailed to the petitioner on February 24, 1944.

3. Admits that the tax in controversy is income tax for the calendar year 1940; denies the remaining allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the petition.

5. (a) to (j), inclusive. Denies the allegations contained [17] in subparagraphs (a) to (j), inclusive, of paragraph 5 of the petition.

(k) Admits the allegations contained in subparagraph (k) of paragraph 5 of the petition.

(l) Denies the allegations contained in subparagraph (l) of paragraph 5 of the petition.

(m) Admits the allegations contained in subparagraph (m) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

EARL C. CROUTER,
Special Attorney, Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed June 24, 1944. [18]

[Title of Tax Court and Cause No. 5042.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PAK) dated February 24, 1944, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual with residence at 3750 West Crestway Drive, Los Angeles 43, California. The return for the period here involved was filed with the Collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was presumably mailed to the petitioner on February 24, 1944. [19]

3. The tax in controversy is income tax for the calendar year 1940, in the amount of \$99,479.04, which is the total deficiency asserted by the Commissioner.

Assignment of Error

4. The determination as set forth in the said notice of deficiency is based upon the following error:

(a) The Commissioner erred in including in petitioner's income for 1940 the amount of \$168,265.62 as petitioner's community one-half of the "fair market value" of 15,384 shares of Class A stock and 38,461 shares of Class B stock of Northrop Aircraft, Inc., said to have been received by the petitioner's

husband in 1940 as compensation for services rendered in connection with the organization of that corporation.

Facts

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) The petitioner's husband was one of the promoters of Northrop Aircraft, Inc., a California corporation engaged in the manufacture of aircraft, and has been the president and a director of the corporation since its inception. He is a well-known aircraft engineer and designer.

(b) Northrop Aircraft, Inc., was incorporated under the laws of California on March 7, 1939. On June 15, 1939, [20] the California Corporation Commissioner issued a permit authorizing the company to sell and issue certain of its securities, including the Class A Common and Class B Common shares referred to hereinafter.

(c) On June 17, 1939, petitioner's husband entered into an agreement with Northrop Aircraft, Inc., whereby the latter was to issue to him not exceeding 24,615 shares of Class A Common Stock and 61,538 shares of Class B Common Stock in consideration for the use of his name, his past promotional services, and his entering into a contract whereby he was to be employed by the company for a term of five years as the person in charge of engineering and design. The agreement provided that petitioner's husband was to become entitled to Class A and Class

B shares as Class A shares were sold to the public for cash and in proportion to such sales as follows:

One Class A share for each 16.25 Class A shares sold for cash

One Class B share for each 6.5 Class A shares sold for cash

Said agreement further provided that 60% of the Class B shares issued to petitioner's husband should be subject to an option in favor of the company at twenty-five cents per share, conditioned upon the death of petitioner's husband or his discharge for cause prior to the expiration of the five-year employment contract. The agreement further provided for a release of one-third of these optioned shares at the end of each of the last three years of a five-year period beginning August 1, 1939. Sixty per cent of Class B shares received by petitioner's husband amounted to approximately 23,077 shares. [21]

(d) Following is a schedule showing the dates on which stock was sold by Northrop Aircraft, Inc., for cash, and the amounts of stock to which petitioner's husband became entitled on such dates in accordance with the agreement described above:

Stock Issuance

	Class A	Class B
1939		
7-21	4,415	11,037
7-24	113	283
7-31	1,933	4,833
8-15	123	307
8-23	153	384
8-28	201	504
8-29	123	307
8-30	798	1,995

Stock Issuance

	Class A	Class B
1939		
9-11	153	384
9-12	246	615
9-20	307	769
9-28	659	1,649
9-29	771	1,927
10- 3	307	769
10-24	53	133
10-27	511	1,278
10-28	461	1,153
11- 1	615	1,538
11- 6	769	1,923
11- 8	769	1,923
11- 9	461	1,153
11-13	307	769
11-15	153	384
11-27	107	269
11-28	865	2,164
11-28 Adjustment for fractional shares	11	11
	<hr/> 15,384	<hr/> 38,461

(e) The Corporation Commissioner's permit authorizing issuance of shares provided that all certificates evidencing any of the shares issued to petitioner's husband (and other promoters) should be deposited with an escrow holder, to [22] be held by such holder until an order for release was given in writing by the Commissioner. The permit further provided that no sale or transfer of the stock held in escrow could be made without the written consent of the Commissioner.

(f) The Corporation Commissioner's permit further required as a condition of the issuance of shares to petitioner's husband that he (with other promoters) agree as owner of Class A and Class B shares

to waive his right to participate in any distribution of assets of Northrop Aircraft, Inc., while the stock was in escrow, until all shareholders who had paid cash or the equivalent for their stock had received the return of the full amount of the issuance price.

(g) The Corporation Commissioner's permit further required as a condition of issuance of shares to petitioner's husband that he (with other promoters) agree as owner of Class A and Class B shares to waive his right to the payment or accrual of any dividends while the shares were in escrow.

(h) It is customary for the California Corporation Commissioner to require stock issued for promotional services or similar consideration in speculative enterprises to be placed in escrow and held there until such time as the corporation's business and financial position have become reasonably well established.

(i) Neither the Class A shares nor the Class B shares to which this proceeding relates had any fair market value at any time during the year 1940. [23]

(j) Petitioner's returns are filed on the basis of cash receipts and disbursements.

(k) The certificates evidencing title to petitioner's husband's shares amounting to 15,384 of Class A and 38,461 of Class B were issued in his name on March 4, 1940, and placed in escrow with the Bank of America, Los Angeles, California, on the same day.

(l) The Class A shares issued by Northrop Aircraft, Inc., had the full rights ordinarily attributable

to common shares, and were designated Class A to distinguish them from the Class B shares, which had a secondary status in relation to the Class A shares. Under the articles of incorporation, the Class B shares were to become convertible to Class A shares if a specified amount of profits was earned during a period of five years from August 1, 1939. Said Class B shares did not become so convertible during 1940. None of the shares issued to petitioner's husband were released from escrow in 1940 except 5,240 Class A shares which were so released on November 19, 1940.

(m) Upon examination of petitioner's 1940 return the Commissioner added to income an amount of \$168,265.62 representing petitioner's community one-half of the claimed value of 15,384 shares of Class A stock and 38,461 shares of Class B stock, all prices at \$6.25 per share. [24]

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that

(A) Petitioner realized no income in 1940 from receipt of stock of Northrop Aircraft, Inc.

(B) There is no deficiency due from petitioner for the year 1940.

/s/ MAYNARD J. TOLL,

/s/ RUSSELL S. BOCK,

Counsel for petitioner. [25]

State of California,
County of Los Angeles—ss.

Inez H. Northrop, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or has had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

/s/ INEZ H. NORTHROP.

Subscribed and sworn to before me this 13th day of May, 1944.

(Seal) /s/ MARGARET C. BATEMAN,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires August 13th, 1947.

I hereby certify that the foregoing is a true copy of the petition to The Tax Court of the United States signed by me on May 16, 1944.

/s/ MAYNARD J. TOLL,
Counsel for Petitioner. [26]

EXHIBIT "A"

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of Internal Revenue Agent in Charge
Los Angeles Division

LA:IT:90D:PAK

February 24, 1944

Mrs. Inez H. Northrop
3750 West Crestway Drive
Los Angeles, California

Dear Mrs. Northrop:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1940, discloses a deficiency of \$99,479.04 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it

to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

HAROLD N. GRAVES,

Acting Commissioner,

By GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

Enclosures: Statement; Form of waiver. [27]

STATEMENT

LA:IT:90D:PAK

Mrs. Inez H. Northrop
3750 West Crestway Drive
Los Angeles, California

Tax Liability for the Taxable Year Ended December 31, 1940

Year	Liability	Assessed	Deficiency
1940	\$101,041.53	\$1,562.18	\$99,479.05

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated April 30, 1942, and April 30, 1943, to your protest dated July 15, 1943,

and to the statements made at the conferences held on November 5, 1943, and December 20, 1943.

A copy of this letter and statement has been mailed to your representative, Mr. Russell S. Bock, 548 South Spring Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustment to Net Income

Net income as disclosed by return.....	\$ 13,002.23
Additional income and unallowable deductions:	
(a) Fair market value of stock received as compensation	168,265.62
(b) Legal expense	482.75
(c) Adjustment of dividends from Northhill Company, Inc.	2,745.28
<hr/>	
Total	\$184,495.88
Additional deduction:	
(d) Loss on worthless stock.....	1,252.50
<hr/>	
Net income adjusted	\$183,243.38

Explanation of Adjustments

(a) During the taxable year 1940 you received 15,384 shares of Class A stock and 38,461 shares of Class B stock of Northrop Aircraft, Inc., a compensation for services rendered in connection with the organization of that corporation. It has been determined that each class of stock had a fair market value of \$6.25 per share when received by you.

Accordingly, there is added to your income the amount of \$168,265.62 representing one-half of the fair market value of the shares of stock received by you, taxable as community income, and computed as follows:

15,384 shares of Class A stock at \$6.25 per share.....	\$ 96,150.00
38,461 shares of Class B stock at \$6.25 per share.....	240,381.25
<hr/>	
Total	\$336,531.25
One-half added to your income.....	\$168,265.62

(b) Legal expense of \$482.75 has not been substantiated as being a proper deduction under section 23(a) of the Internal Revenue Code.

(c) The amount of taxable dividends received from the Northhill Company, Inc., has been increased from \$1,047.80 reported by you to the correct amount of \$3,793.08.

(d) A loss of \$1,252.50 is allowed upon your investment in the capital stock of Air Balance Instrument Company becoming worthless during the taxable year.

Computation of Alternative Tax

Net income adjusted	\$183,243.38
Plus: Net long-term capital loss.....	24.00
<hr/>	
Ordinary net income.....	\$183,267.38
Less: Personal exemption\$ 1,800.00	\$ 1,800.00
<hr/>	
Balance (surtax net income)	\$181,467.38
Less: Earned income credit	1,400.00
<hr/>	
Net income subject to normal tax.....	\$180,067.38
Normal tax at 4% on \$180,067.38.....\$ 7,202.70	
Surtax on \$181,467.38	84,660.43
<hr/>	
Partial tax	\$ 91,863.13
Minus: 30% of net long-term capital loss....	7.20
<hr/>	
Alternative tax	\$ 91,855.93

Computation of Tax

Net Income Adjusted	\$183,243.38
Less: Personal exemption\$ 1,800.00	\$ 1,800.00
	<hr/>
Balance (surtax net income)	\$181,443.38
Less: Earned income credit	
(10% of \$14,000.00)	1,400.00
	<hr/>
Net income subject to normal tax.....	\$180,043.38
Normal tax at 4% on \$180,043.38.....\$ 7,201.74	
Surtax on \$181,443.38	84,646.03
	<hr/>
Total normal tax and surtax	\$ 91,847.77
Alternative tax	\$ 91,855.93
Defense tax (10% of \$91,855.93).....	9,185.59
	<hr/>
Total income tax	\$101,041.52
Correct income tax liability.....	\$101,041.52
Income tax assessed:	
Original. account No. 203982.....\$ 997.70	
Additional, July, 1942, 510118....	564.78
	<hr/>
Total income tax assessed.....	1,562.48
	<hr/>
Deficiency of income tax.....	\$ 99,479.04

[Endorsed]: T.C.U.S. Filed May 22, 1944. [30]

[Title of Tax Court and Cause No. 5042.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that the notice of deficiency involved herein was mailed to the petitioner on February 24, 1944.

3. Admits that the tax in controversy is income tax for the calendar year 1940; denies the remaining allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the petition.

5. (a) to (j), inclusive. Denies the allegations contained [31] in subparagraphs (a) to (j), inclusive, of paragraph 5 of the petition.

(k) Admits the allegations contained in subparagraph (k) of paragraph 5 of the petition.

(l) Denies the allegations contained in subparagraph (l) of paragraph 5 of the petition.

(m) Admits the allegations contained in subparagraph (m) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
EARL C. CROUTER,
Special Attorney, Bureau of
Internal Revenue.

[Endorsed]: T.C.U.S. Filed June 24, 1944. [32]

8 T. C. No. 89

The Tax Court of the United States

LaMotte T. Cohu, Petitioner, et al.¹ v. Commissioner
of Internal Revenue, Respondent.

Docket Nos. 5039, 5040, 5041, 5042, 5043, 5044, 5045,
5046.

Promulgated April 9, 1947.

1. On the facts, held, that petitioners realized income in 1940 rather than 1939 on account of certain promotional stock issued to them.

2. Value of promotional stock determined.

¹Proceedings of the following petitioners are consolidated herewith: Didi M. Cohu; John K. Northrop; Inez H. Northrop; Gage H. Irving; Eleanor Salisbury Irving; Edward A. Bellande and Molly Lamont Bellande; Moye W. Stephens and Inez B. Stephens.

3. Promotional stock issued to petitioner LaMotte T. Cohu, held to be community property.

Sidney H. Wall, Esq., and George F. Elmen-dorf, Esq., for the petitioners in Docket Nos. 5039 to 5045, inclusive.

Wesley G. LaFever, Esq., for the petitioners in Docket No. 5046.

R. E. Maiden, Jr., Esq., for the respondent.

Respondent determined deficiencies in petitioners' income taxes for the calendar year 1940 as follows:

Docket No.	Petitioner	Amount of Deficiency
5039	LaMotte T. Cohu	\$60,490.65
5040	Didi M. Cohu	22,047.92
5041	John K. Northrop	99,479.05
5042	Inez H. Northrop	99,479.04
5043	Gage H. Irving	15,694.14
5044	Eleanor Salisbury Irving	16,381.31
5045	Edward A. Bellande and Molly Lamont Bellande	5,833.34
5046	Moye W. Stephens and Inez B. Stephens	4,455.93

The principal question, common to all the cases here involved, is whether certain stock received by petitioners primarily for their promotional work constituted realization by them of income in 1939 or 1940 and, if in the latter year, the amount thereof. With respect to Docket Nos. 5039 and 5040, there is the question of whether the stock received by LaMotte T. Cohu is his separate property or constitutes community property. The returns of the petitioners for 1940 were filed on a cash and calendar year basis with the collector of internal revenue for the sixth district of Califor-

nia at Los Angeles. The cases were consolidated at the hearing. The facts which were stipulated are so found.

FINDINGS OF FACT

Petitioners John K. Northrop, Inez H. Northrop, Gage H. Irving, Eleanor Salisbury Irving, Edward A. Bellande, Molly Lamont Bellande, Moye W. Stephens and Inez B. Stephens are now and at all times material hereto were individuals residing in Los Angeles County, California.

Petitioners Inez H. Northrop, Eleanor Salisbury Irving, Molly Lamont Bellande and Inez B. Stephens are now and at all times material hereto were the respective wives of petitioners John K. Northrop, Gage H. Irving, Edward A. Bellande and Moye W. Stephens. [34]

Petitioners Lamotte T. Cohu and Didi M. Cohu are now and at all times material hereto were husband and wife, and are now residents of Los Angeles, California.

Petitioners John K. Northrop, Lamotte T. Cohu, Gage H. Irving, Edward A. Bellande, and Moye W. Stephens, together with T. T. Ellsworth, were the promoters of Northrop Aircraft, Inc., a California corporation, hereinafter referred to as the "Company." As used hereinafter the word petitioners, unless otherwise indicated, will refer to the above promoters, excepting T. T. Ellsworth.

The Company was incorporated under California law March 7, 1939, and was authorized to issue two classes of stock to be designated Class A com-

mon and Class B common. By separate contracts between the Company and petitioners, dated June 17, 1939, the Company agreed to issue certain Class A and Class B stock to petitioners. These contracts provided in substance as follows:

(a) **Shares Agreed to be Issued:** Under each of the contracts the Company agreed to issue to the promoter concerned Class A and Class B common shares not in excess of specified amounts, the number of shares to be issued to each to be determined upon the basis of a specified ratio to the number of Class A common shares thereafter sold to the public. The maximum numbers of Class A and Class B common shares issuable to the respective promoters under the contracts and the ratios between the number of Class A shares sold to the public and the numbers of Class A and Class B shares to be issued to the respective promoters were as follows: [35]

Promoter	Class A		Class B	
	Maximum	Ratio to A Shares Sold to Public	Maximum	Ratio to A Shares Sold to Public
Northrop	24.615	1 to 16.25	61.538	1 to 6.5
Cohu	12.308	1 to 32.5	18.462	1 to 21.667
Irving	7.385	1 to 51.165	17.231	1 to 23.214
Bellande	2.462	1 to 162.5	3.692	1 to 108.33
Stephens	2.462	1 to 162.5	3.692	1 to 108.33
Ellsworth	2.462	1 to 162.5	3.692	1 to 108.33

(b) **Time of Issuance:** Each of the contracts provided that as of the date the Company first received cash proceeds from the sale of its shares, and thereafter if and as the Company should issue shares for money or other specified considerations,

the Company should issue to the promoter concerned Class A and Class B common shares in the ratios specified above to the number of Class A common shares so issued to the public for cash or such other specified considerations. Each of the contracts provided that the promoter's "rights to shares hereunder shall be deemed to have accrued as of the date of sale of the shares which shall have determined his right thereto, * * * notwithstanding the date of actual issuance thereof to" the promoter.

(c) Consideration: Under the Northrop contract the Company agreed to issue the shares to Northrop in consideration for the use of his name, his past promotional services, and his agreement to be employed by the Company to take charge of engineering and designing for a period of five years at annual salary of \$9,000. The consideration under the Cohu and Irving contracts was past promotional services and agreements to be employed by the Company, in Cohu's case as general manager for five years [36] at an annual salary of \$9,000, and Irving's case as assistant general manager in charge of production for five years at an annual salary of \$6,750. In the contracts with Bellande, Stephens and Ellsworth, the consideration was past promotional services.

(d) Options: Under each of the contracts with Northrop, Cohu and Irving, the Company was granted an option to purchase 60 per cent of the Class B shares issued thereunder upon the happening of certain events at the cash price of 25

cents per share. The Northrop and Irving contracts provided that the option should be exercisable in the event of the death of the employee or in the event of the termination of his employment contract by reason of his default. The Cohu contract provided that the option should be exercisable in the event of his death or in the event of the termination of his employment contract by the Company either by reason of his default or at the Company's option without default. Under each of these three contracts 60 per cent of the Class B common shares were to remain subject to the option for a period of two years after a date determined to be August 1, 1939, after which period the shares were to be gradually released from the option over the succeeding three-year period.

On June 15, 1939, the California Commissioner of Corporations issued a permit to the Company to sell and issue securities. Paragraph 4 of this permit authorized the Company as follows:

4. To sell and issue an aggregate of 51,694 of its Class A Common shares and 108,307 of its Class B common shares to John K. Northrop, Lamotte T. Cohu, Gage H. Irving, Moye W. Stephens, Edward A. Bellande, and T. T. Ellsworth, in the manner and form, for the considerations, and in the proportions as related to the shares sold under paragraphs 1 and 2 hereof, as set forth in the application. [37]

The permit conditioned the issuance of promotional shares as follows:

(b) That none of the shares authorized by para-

graph 4 hereof shall be sold or issued unless and until the applicant first shall have selected an escrow holder and said escrow holder shall have been first approved in writing by the Commissioner of Corporations; that, when issued, all certificates evidencing any of said shares shall be forthwith deposited with said escrow holder, to be held as an escrow pending the further written order of the said Commissioner; that the receipt of said escrow holder for said certificates shall be filed with said Commissioner; and that the owner or persons entitled to said shares shall not consummate a sale or transfer of said shares, or any interest therein, until the written consent of said Commissioner shall have been obtained so to do.

(c) That none of the shares authorized by paragraph 4 hereof shall be sold or issued unless and until John K. Northrop, Lamotte T. Cohu, Gage H. Irving, Moye W. Stephens, Edward A. Bel-land, and T. T. Ellsworth shall have executed an agreement in writing with said applicant, and filed a copy thereof with the Commissioner of Corporations, whereby they shall in effect agree for themselves, their successors, administrators, and assigns, as owner of the Class A Common shares and the Class B Common shares herein authorized to be issued to them under paragraph 4 hereof, to waive their right to participate in any distribution of assets of the applicant (excepting dividends payable according to law), while said shares shall be required to be held in escrow, until all stockholders who have paid cash or its equivalent for their

shares shall have received the return of the full amount of the issuance price.

(d) That none of the shares authorized by paragraph 4 hereof shall be sold or issued unless and until John K. Northrop, Lamotte T. Cohn, Gage H. Irving, Moye W. Stephens, Edward A. Bellande, and T. T. Ellsworth shall have executed a written waiver, and filed a copy thereof with the Commissioner of Corporations, for and on behalf of themselves, their successors, administrators, and assigns, wherein they waive, as owners of the Class A Common shares and the Class B Common shares herein authorized to be issued to them under paragraph 4 hereof, their right to the payment or accrual of any dividends while said shares shall be required to be held in escrow. [38]

On or about January 4, 1940, petitioners entered into a written agreement with the Company dated as of November 30, 1939, by which the petitioners waived their respective rights to participate in any distribution of assets of the Company while the promotional shares were required to be held in escrow and for the same period of time waived their rights to the payment or accrual of any dividends. An executed counterpart of such agreement was filed by the Company with the Commissioner of Corporations on or about January 22, 1940. On January 25, 1940, the Commissioner of Corporations approved the agreement of and acceptance by the Bank of America National Trust & Savings Association as escrow agent.

Pursuant to the provisions of the agreements

dated June 17, 1939, and pursuant to the provisions of the Corporation Commissioner's permit dated June 15, 1939, the Company on March 4, 1940, issued certificates to Class A common shares and Class B common shares of the Company in the following names and in the following respective amounts:

Name	Class A	Class B
John K. Northrop	15.384	33.461
LaMotte T. Cohu	7.692	11.538
Gage H. Irving	4.615	10.769
Edward A. Bellande	1.538	2.307
Moye W. Stephens	1.538	2.307
A. H. Smith	1.538	2.307

All of these certificates were on the same day placed in escrow with Bank of America National Trust & Saving Association, Los Angeles, California.

On November 28, 1939, the following transaction was consummated through White, Wyeth & Co., a Los Angeles securities firm, acting as a principal; T. T. Ellsworth assigned to A. H. Smith, a resident of Houston, Texas, his [39] contract with the Company dated June 17, 1939; A. H. Smith delivered to White, Wyeth & Co. 2,500 shares of Duval Texas Sulphur Co., of which 2,200 shares were transferred to T. T. Ellsworth in exchange for his contract, and 300 shares were retained by White, Wyeth & Co. as its profit on the transaction.

On November 28, 1939, T. T. Ellsworth sold 600 such shares of Duval Texas Sulphur Co. at a price of $7\frac{1}{8}$, for which he received \$4,251 on November 29, 1939.

Ellsworth had made written application dated

November 16, 1939, to the Commissioner of Corporations requesting written consent to the sale and transfer to Smith of all Ellsworth's right, title and interest in and to his shares of stock to which he was entitled under the employment contract of June 17, 1939. This manner of accomplishing the transfer was apparently abandoned and on November 21, 1939, the Company requested the Commissioner of Corporations to amend their permit by substituting Smith for Ellsworth as one of the promoters to whom applicant might issue shares. Such amendment was granted November 28, 1939.

By application dated July 26, 1940, LaMotte T. Cohu requested the Commissioner of Corporations to issue an order consenting to the assignment by way of gift to the applicant's wife, Didi M. Cohu, of 5,769 Class B common shares of the Company and to each of applicant's three daughters, Anne T. Cohu, Renee Cohu and Marit Cohu, respectively, of 1,923 of the shares, all of such shares being then held in escrow pursuant to the Corporation Commissioner's permit dated June 15, 1939. The Corporation [40] Commissioner, by order dated July 31, 1940, consented to the transfer of the shares in accordance with the application upon the condition that the new certificates evidencing such shares be deposited with Bank of America National Trust & Savings Association and held in escrow in accordance with the conditions of the Corporation Commissioner's permit dated June 15, 1939, and upon the further condition that the old certificate or certificates be immediately cancelled.

By an order dated November 19, 1940, the Commissioner of Corporations ordered 11,000 of the Class A shares then held in escrow to be released from escrow to the following named persons and in the following respective amounts:

Class A Shares	
Name	Released
John K. Northrop	5,240
LaMotte T. Cohu	2,620
Gage H. Irving	1,580
Edward A. Bellande	520
Moye W. Stephens	520
A. H. Smith	520

The stock to which the petitioners became entitled, except for the 11,000 shares just mentioned above, was released from escrow by order of the Commissioner of Corporations on October 26, 1942.

Under the provisions of Article Five of the articles of incorporation of the Company as amended June 14, 1939, the Class B common shares of the Company were subject to the following limitations and conversion rights:

(a) Class B shares were not entitled to participate in dividends declared or paid prior to July 1, 1942 (that date and other dates hereinafter mentioned being determined under the provisions of the Articles in relation to the actual date when the Company first received cash proceeds from the sale of its Class A shares), and were [41] entitled to participate in dividends declared and paid thereafter only in the event that specified earnings requirements per Class A share had been met.

(b) In the event of liquidation, dissolution or winding up of the Company, the holders of Class B

shares were not entitled to receive any distribution unless and until the holders of all Class A shares then outstanding should have received an amount equal to the consideration received by the Company upon the original issuance thereof.

(c) The Class B shares were to become void if no adjusted net profits, as therein defined, were earned by the Company either during the five-year period commencing August 1, 1939, or during the three-year period commencing August 1, 1941.

(d) Class B shares were convertible, share for share, into Class A shares on August 1, 1944, if adjusted net profits, as therein defined, had then amounted to 50c per Class A share per annum for the five-year period commencing August 1, 1939, based on a computation of such adjusted net profits either for the entire five-year period or for the three-year period commencing August 1, 1941. If such earnings per Class A share amounted to less than 50c per annum for such five-year period, then the Class B shares were convertible into a proportionately smaller number of Class A shares. Class B shares were further convertible, share for share, into Class A shares at any time prior to August 1, 1944, when the adjusted net profits, as therein defined, computed either from August 1, 1939, or from August 1, 1941, amounted in total to \$1,000,000.

None of the Company's Class B shares became convertible into Class A shares prior to August 1, 1942, nor were any of the Class B shares converted into Class A shares prior to August 1, 1942. On

August 1, 1942, pursuant to the provisions of Article Five (c)(1) of the articles of incorporation, all Class B shares became convertible, share for share, into Class A shares, by reason of the fact that the Company's adjusted net profits, as defined in Article Five (a)(4), computed from August 1, 1941, amounted to more than \$1,000,000. [42]

The Company and certain underwriters made and entered into an underwriting agreement dated June 17, 1939, pursuant to which the several underwriters named in the agreement agreed to purchase and the Company agreed to sell 200,000 of its Class A common shares in units of five shares and one public warrant at the price of \$25 per unit. Such agreement further provided for the employment of the several underwriters as exclusive agents of the Company for the offering and sale of an additional 200,000 of the Company's Class A common shares in units of five shares and one public warrant, and for the payment by the Company to each underwriter of a commission of \$1 per share on all shares of such stock sold by such underwriter as agent. The initial public offering price for the 200,000 underwritten shares and the 200,000 additional agency shares was specified in the underwriting agreement as \$30 per unit of five shares and one public warrant. As additional consideration to the underwriters, the agreement provided for the delivery by the Company to the underwriters of "underwriters' warrants" for the purchase of an aggregate of 53,333 shares of the Class A common stock, exercisable during the period of five years

at the price of \$7 per share or 80 per cent of book value, whichever was higher.

Before the public offering of the Company's Class A stock was commenced, two members of the original underwriting group withdrew and Lester & Co. was requested to and did become a member of the underwriting group. At least one other securities firm, Bateman, Eichler & Co., was approached with a proposition that it become a member of the underwriting group, but [43] that firm declined to participate in the underwriting or sale of the Class A stock to the public because it considered the stock too speculative to sell to its clients.

The Company first received cash proceeds from the sale of its shares on July 21, 1939, when the underwriters accepted and paid for in cash the first block of the underwritten Class A common shares which were offered to the public.

Difficulty in marketing the Class A stock to the public was encountered shortly after the public offering was commenced, and the shares were not well received by the public, with the result that only a very small amount of stock had been sold or subscribed for after 10 days or 2 weeks of trading.

In an effort to bolster public confidence in the stock by having an initiated investor take a substantial interest therein, the underwriters persuaded Floyd B. Odum, president of Atlas Corporation and a personal friend of John K. Northrop, to subscribe in August, 1939, on behalf of Atlas Corporation for 30,000 shares of Class A stock and 6,000

public warrants (6,000 underwritten units). The units were purchased by Atlas Corporation and sold by the underwriters at the underwriters' cost of \$25 per unit, in order to stimulate the sale of shares to the public.

After the underwriters had disposed of between 200,000 and 225,000 shares of Class A common stock to the public it became apparent that it would be very difficult, if not impossible, to distribute more than a total of 250,000 shares to the public. As a result of conferences between the underwriters and the promoters, the Company's initial program, which had [44] called for the expenditure of approximately \$2,000,000, was reduced in scope, it being determined that \$1,250,000 would enable the Company to start operations on a smaller scale. Accordingly, the underwriting agreement was amended as of August 15, 1939, to reduce from 200,000 to 50,000 the number of shares to be sold the public on an agency basis. The total number of Class A common shares to be sold to the public was thus reduced from 400,000 to 250,000.

A total of 250,000 of the Company's Class A common shares (together with warrants for the purchase of 103,333 Class A common shares) were issued by the Company and were accepted and paid for in cash by the underwriters during the period beginning July 21, 1939, and ending November 28, 1939.

On or about February 15, 1940, the Company completed its factory at Hawthorne, California. On

March 1, 1940, the Company had 142 employees, which number rose to 192 by the end of the month. On March 4, 1940, the Company had unfilled orders in the amount of \$760,249.16, consisting solely of one contract dated December, 1939, with Consolidated Aircraft Corporation for the manufacture of seats, cowls and empennages for the United States Army and Navy airplanes. On March 12, 1940, the Company got an order from the Norwegian Government for 24 Navy planes, the total contract price being \$1,558,582.62. Prior to October 22, 1940, the Company had entered into contracts totalling \$24,000,000.

On March 4, 1940, the Company faced substantial competition, including that offered by Douglas Aircraft Co., Inc., North American Aviation Company, Lockheed Aircraft Corporation, Consolidated Aircraft Corporation, Boeing Aircraft Company and Vultee Aircraft Corporation, all of which were [45] established aircraft manufacturing companies having operating plant facilities on the west coast and having proven products ready for sale.

As of February 29, 1940, the book value of the Company's then outstanding 282,305 Class A shares and 67,689 Class B shares was \$1,309,436.38. As of July 31, 1940, the book value of the Company's then outstanding 282,305 Class A shares and 67,689 Class B shares was \$1,199,174.93. As of July 31, 1941, the book value of the Company's then outstanding 282,305 Class A shares and the 74,637

Class B shares was \$156,331.54.² The Company had no earnings prior to March 4, 1940, nor had it paid any dividends on its stock. The Company suffered a loss in the fiscal year ending July 31, 1940, which was capitalized. In the fiscal year ending July 31, 1941, the Company suffered a net loss in the amount of \$848,778.33. The Company first showed earnings in the fiscal year ending July 31, 1942, and it first declared and paid dividends on its stock in November, 1943.

The Class A common shares of the Company that were sold to the public and upon which there were no restrictions or limitations as to sale, dividends or rights to participate in distribution of assets (hereinafter called "unrestricted Class A common shares"), were never, during 1939 or 1940, traded or listed on any securities exchange, but were traded on an over-the-counter basis through securities dealers.

The unrestricted Class A common shares were traded in for the most part in relatively small blocks of 100 or less, at prices ranging from a [46] low of 5 to a high of $6\frac{7}{8}$ during the period beginning November 9, 1939, and ending March 8, 1940. On March 1, 1940, 100 such shares were traded

²The sharp decrease in book value as of July 31, 1941, as compared with the prior year, is principally due to a very substantial increase in the latter year of current liabilities. This increase in current liabilities consisted principally of advances received on contracts in excess of expenditures thereon.

at $57/8$, 50 at $61/8$, and 100 at $61/4$. On March 5, 1940, 100 were traded at $57/8$, and 100 at $63/8$.

During November, 1940, the unrestricted Class A common shares were traded on an over-the-counter basis at prices ranging from $61/8$ to $71/4$.

During 1940 the highest price at which any such unrestricted Class A common shares were purchased or sold by Lester & Co. was \$8 in April, 1940, and the lowest price at which any such shares were purchased or sold by Lester & Co. was \$5 in May, 1940.

During the period commencing November 9, 1939, and continuing through the year 1940, there was trading by securities dealers in warrants for the purchase of unrestricted Class A common shares. Each of the warrants entitled the holder thereof to purchase one Class A common share at any time on or before December 1, 1944, at the higher of the following prices; (a) \$7 per share, or (b) an amount equal to 80 per cent of the book value of one share of such stock at the end of the quarterly period next preceding the date of exercise.

During the period from November 9, 1939, to and including March 10, 1940, Lester & Co. purchased 196 such warrants and sold 150 such warrants at prices ranging from $\$2-1/8$ to $\$3-1/4$ per warrant, the average price per warrant being \$2.175.

During the period from March 11, 1940, to and including December 31, 1940, Lester & Co. purchased 3,290 such warrants and sold 3,283 such warrants at prices ranging from \$2 to \$4 per warrant, the average price per warrant being \$3.43.

The Class A and Class B promotional shares were worth \$4 a share as of March 4, 1940.

Prior to 1939, petitioners LaMotte T. and Didi Cohn had never lived outside the State of New York. In January, 1939, LaMotte went to Los Angeles in the hope of making an investment for his New York company, Air Investors, Inc. He came in contact with petitioner Northrop and became involved in the organization and financing of the Company, the details of which appear above. LaMotte went to New York early in 1939 in connection with financing the California Company and returned to California. He assisted in the organization of the Company, which was incorporated March 7, 1939. At that time LaMotte intended to take a position with the new company and make California his home if the financial arrangements for the Company were adequately made. By early June, 1939, adequate financial arrangements had been made and the final underwriting agreement was executed June 17, 1939. Early in June LaMotte definitely and finally decided to remain in California and make it his home. He then telephoned Didi, informed her of this decision and told her to close the New York house and come to California. Didi arrived in Los Angeles on or about July 1, 1939. The New York house was later sold. LaMotte on or about June 20, 1939, resigned from Air Investors, Inc., resigned from his various Eastern clubs and otherwise severed his business and social connections in New York. LaMotte and Didi bought a house in California and the children entered school there in September, 1939.

OPINION

Hill, Judge: The first question is whether by virtue of the promotional shares petitioners realized income in 1939 rather than 1940. Since the instant proceeding only involves 1940 a determination that the [48] income, if any, was realized in 1939 would dispose of the cases.

Petitioners earnestly contend that they acquired a proprietary interest in the Company in 1939 which rendered them taxable, if at all, in 1939 rather than 1940. Petitioners argue that the public sales which determined the amount of their interests were made in 1939 and that by the terms of their contracts with the Company their rights to shares accrued as of the date of such public sales notwithstanding the date of actual issuance to them. Petitioners further argue, in effect, that at the end of 1939 merely the formality of the Corporation Commissioner's approval of the escrow agent and the execution of the waivers by petitioners required accomplishment before the issuance of shares to them.

We have carefully considered this argument and have concluded that petitioner's did not acquire a proprietary interest in the Company in 1939. The permit authorizing the Company's stock issue provided that no promotional shares "shall be sold or issued unless and until the applicant [the Company] shall have selected an escrow holder and said escrow holder shall have been first approved in writing by the Commissioner of Corporations * * *." The

permit further provided that no promotional shares "shall be sold or issued unless and until * * *" the petitioners "shall have executed an agreement in writing with said applicant and filed a copy thereof with the Commissioner of Corporations" waiving their rights to dividends and distribution of assets. In 1939 the Commissioner of Corporations had not approved in writing the appointment of the escrow agent nor had petitioners executed their waivers. These requirements were clearly conditions precedent to the Company's authority to issue shares. The Company's authority to issue [49] shares or create proprietary interests derives from the state and is not an inherent corporate power which can be exercised by contract independently of sovereign control. Therefore the Company could only bestow proprietary interests on petitioners when and as authorized by the Commissioner of Corporations. *Live Oak Cemetery Ass'n. v. Adamson, et al.*, 288 Pac. 29. See also *Fletcher Cyclopedia Corporations*, sec. 5158. A recognition of the distinction between the issuance of certificates and the issuance of shares does not affect our conclusion. Nor does the fact that original subscribers to stock are sometimes regarded as stockholders even absent an issuance of shares have application here. We are satisfied that petitioners did not acquire any stock or other proprietary interest in the Company in 1939.

Petitioners alternatively argue that they constructively received a stock or proprietary interest in 1939. From what we have already said it is ap-

parent that the theory of constructive receipt can have no application in the instant situation.

Although not explicitly argued it seems to us that petitioners' position perhaps unconsciously involves a reliance upon the equivalent of cash theory. We have therefore considered the possible application of this theory to the instant situation and have rejected it. It is undoubtedly true that petitioners had a contract right of value. They had fully rendered their considerations, i.e., past promotional services, entering employment contracts, and so on. The Company was obliged to issue certain shares to petitioners subject, of course, to the limitations and requirements imposed by the Commissioner of Corporations. The Company was at least impliedly required under its contracts with petitioners to comply [50] with these limitations and requirements. That these obligations or duties of the Company or the correlative contract rights of the petitioners had value is witnessed by the Ellsworth-Smith transfer described in the facts. Nevertheless, we do not think that petitioners accepted these contract rights as payment. The written contracts were merely evidence of the Company's undertaking and while undoubtedly valuable and transferable with the Corporation Commissioner's permission, they were not given or accepted as payment. Unless the Company's obligation as evidenced by the written contracts with petitioners was accepted by them as payment, we do not think such evidenced obligations can be considered the equivalent of cash even though valuable in the

hands of a cash-basis taxpayer. San Jacinto Life Insurance Co., 34 B. T. A. 186; Frank Kuhn, 34 B. T. A. 274; Great Southern Life Insurance Co., 33 B. T. A. 512, affirmed 89 Fed. (2d) 54, certiorari denied 302 U. S. 698; Schlemmer v. United States, 94 Fed. (2d) 77. It is pertinent in this connection to note that section 22 (a), Internal Revenue Code, defines as gross income, *inter alia*, "compensation for personal services * * * of whatever kind and in whatever form *paid* * * *." (Italics supplied). While contract rights under certain circumstances can be considered the equivalent of cash we do not think the instant situation is properly susceptible to such treatment. Nor as indicated above do we think such contract right should be confused with a proprietary interest in the Company. We therefore conclude that petitioners did not realize income in 1939 by virtue of their situation with respect to the promotional shares in question. [51]

Having determined that any income realized on account of the promotional shares was not realized in 1939 it becomes necessary to determine the value of the promotional shares as of March 4, 1940. The petitioners concede on brief that if 1939 is not the income year that, in that event, March 4, 1940, becomes the crucial date, being the date when the promotional shares were issued to petitioners and the certificates therefor placed in escrow.

Respondent has determined that each share of promotional stock, Classes A and B alike, was worth \$6.25. This value was apparently based largely on

the price for which the unrestricted Class A shares sold for in 1940. Petitioners, on the other hand, contend that the promotional stock had no value as of March 4, 1940. We have found as a fact that each share of promotional stock, Classes A and B alike, was worth \$4 as of March 4, 1940.

We have treated Class A and Class B promotional shares as equivalents in making our evaluation. We have done this for convenience and simplicity, because the parties approach the problem in this manner and because as a practical matter the limitations imposed on the promotional stock virtually eliminated any distinction between the two classes of stock. The Company's option to repurchase the promotional Class B stock for 25 cents a share seems to us to have little significance for evaluation purposes because the petitioners were the directors of the Company and, further, had they exercised such an option for the Company the result would have been to increase the value of the Class A shares. Nor does the junior position of the Class B shares have significance with respect to the promotional shares [52] since petitioners had to waive all their rights to any dividends and distributions of assets. Nor does the provision calling for the cancellation of Class B shares at the end of the 5-year period, if they failed to become convertible, have significance with respect to the promotional shares because if they failed to become convertible, that would mean that there had been no adjusted net profits and therefore the promotional Class A shares would have remained in escrow subject to the waivers. In other words, it seems to us that with respect to the promotional shares the dis-

inction between Class A and Class B was essentially eliminated by the restrictions imposed and, in practical operation, if the Class A shares had any value the Class B shares directly or indirectly acquired an equivalent value. For these reasons we feel warranted in treating them for evaluation purposes as equivalents.

We do not think respondent's evaluation can be sustained. The unrestricted Class A stock sold during 1940 at a high of \$8 and a low of \$5 or at a mean average of \$6.50. Respondent's determination of \$6.25 for the promotional shares, we think too closely approximates the value of the unrestricted shares and fails to give sufficient recognition to the restrictions imposed on the promotional shares in question. We think that the Ellsworth-Smith transfer furnishes the best available indication of the approximate value of the promotional shares and this transfer indicates an approximate value of \$4.50 a share. It is true as petitioners suggest that this transfer was a somewhat isolated transaction but we nonetheless think it offers a reliable approximation of value. We have found a value slightly [53] less than the value indicated by the Ellisworth-Smith transaction. In so doing we have given consideration and effect to such factors as the managerial relationship of petitioners to the Company, the large stock represented by the shares in question and the unproven position of the Company as compared with its more seasoned competitors. After a very careful consideration of these factors, in addition to all the other pertinent evidence bearing on value, we have concluded that \$4

a share represents the fair value of the promotional stock as of March 4, 1940, the crucial date.

The remaining question is whether the promotional shares received by petitioner LaMotte T. Cohu constituted his separate property or was community property. The answer depends on whether LaMotte was domiciled in California when he acquired the shares. We have found as a fact that LaMotte decided to make California his home early in June, 1939, and this fact coupled with his presence in California and the other attendant circumstances of the situation satisfy us that he became domiciled in California at that time. We think that for purposes of determining the community or separate character of the shares that June 17, 1939, is the earliest possible determinative date, being the date LaMotta entered the written contract with the Company by which the Company undertook to issue the promotional shares to him. Since LaMotte was domiciled in California prior to this date, it follows that the shares became the community property of LaMotte and Didi and we so hold.

Decisions will be entered under Rule 50. [54]

Before The Tax Court of the United States

No. 5039—LaMOTTE T. COHU,
No. 5040—DIDI M. COHU,
No. 5041—JOHN K. NORTHROP,
No. 5042—INEZ H. NORTHROP,
No. 5043—GAGE H. IRVING,
No. 5044—ELEANOR SALISBURY IRVING,
No. 5045—EDWARD A. BELLANDE and
MOLLY LAMONT BELLANDE,
No. 5046—MOYE W. STEPHENS and
INEZ B. STEPHENS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR REVIEW BY FULL COURT

Now Come petitioners, by their attorneys of record, and move that the findings of fact and opinion of the Division of this Court promulgated April 9, 1947, in the above-entitled proceedings be reviewed by the full Court, and show as grounds for their motion the following:

A. The Division's holding that the income, if any, resulting from receipt of promotional shares, was realized [56] in 1940 rather than in 1939 is erroneous in law and is not based on the evidence.

1. In holding that the petitioners neither actually nor constructively receive income in 1939, the Division perhaps inadvertently has opened the door to postponement of realization of income at the elec-

tion of the taxpayer. The only conditions of the Corporation Commissioner's permit which remained to be performed after November 28, 1939, were of a formal and insubstantial nature. Practically speaking, the petitioners received nothing in 1940 that they did not already possess in 1939, and to hold otherwise is to permit a cash basis taxpayer to elect the year of receipt of income.

2. Petitioners' contention that they acquire in 1939 property interests which constituted income to the extent of their fair market value, if any, in that year, is fully supported by the evidence before this Court and the applicable law referred to in petitioners' briefs on file herein.

3. Whether their interests constituted proprietary interests in the Company, economic ownership of shares, equitable title to shares, or contract rights to receive shares, they constituted the "equivalent of cash" if it be assumed that such interests had fair market value in 1939. 2 Mertens, *Law of Federal Income Taxation*, [57] §11.02-11.03. If the exchange by Ellsworth of his interest in the Company is entitled to any weight as evidence of fair market value of the promotional shares on March 4, 1940, (which petitioners do not concede), such exchange would be even stronger evidence of fair market value of the similar interests of the petitioners at the time of the exchange.

B. The Division erred in holding that the restricted Class A and Class B shares issued to the petitioners had a fair market value of \$4 per share or any fair market value as of March 4, 1940. Such

decision is erroneous in law and is not based on the evidence in the following respects:

1. The Class A and Class B promotional shares were erroneously held by the Division to be equivalent in value.

(a) The Division valued all the Class B shares at \$4 each and gave no effect whatever to the Company's option to purchase, at 25 cents per share, 60% of the Class B shares issued to petitioners Northrop, Cohn and Irving, which option was exercisable in the Company's sole discretion upon the death of the holder or upon termination of his employment, and was binding upon his successors and assigns. The fixed option price of 25 cents per share constitutes the absolute upper limit of the fair market value of the optioned shares. The Court's attention is respectfully [58] invited to *Helvering v. Salvage* (1936), 297 U.S. 106, 109; *Helen S. Delone* (1946), 6 T.C. 1188, and cases therein cited. There is no merit in either of the two reasons relied on by the Division as its sole basis for disregarding the options.

(1) The fact that petitioners were directors of the Company does not destroy the significance of the options. The Division apparently failed to realize that the petitioners holding optioned stock were only three of a board of nine directors, and together held only about 25% of the total outstanding Class A and Class B shares. Upon the occurrence of one of the conditions entitling the Company to exercise its option, it is obvious that no one of the petitioners holding optioned stock, nor even all three acting together, would be able to prevent the exercise of the option. Moreover, the death of any of those three

petitioners not only would make the option exercisable as to his stock, but also would effectively remove him from the board.

(2) Nor are the options deprived of significance by the fact, relied on by the Division, that their exercise by the Company would result in an increase in the value of the Class A shares. The Division overlooked the fact that the holders of optioned Class B stock held less [59] than 10% of the Class A shares and would enjoy only that proportion of any such increase in value, and that an even smaller percentage would inure to the benefit of a single petitioner as to whose stock alone the option might be exercised.

(b) The statement in the opinion of the Division that the Class B shares, directly or indirectly, would acquire a value equivalent to that of the Class A shares, if any, is based upon a misconception of the facts. Assuming that the Class A shares had any value, the Class B shares could acquire an equivalent value only by becoming convertible to Class A stock, share for share. That could happen only (1) at the end of the 5-year period if adjusted net profits had then amounted to 50 cents per annum per Class A share, or (2) during the 5-year period if and when adjusted net profits amounted to \$1,000,000. If Class B shares failed to become convertible to Class A shares on a share for share basis, the Class B shares might have become void if no adjusted net profits were earned by the end of the 5-year period, or they could have become convertible to a proportionately smaller number of Class A shares if the adjusted net profits amounted to less than 50 cents per annum per

Class A share. To hold that the Class A and B shares were equivalent in value as of March 4, 1940, is to hold that it was substantially certain as of that date that the Company would, by the end of the 5-year period (August 1, [60] 1944), realize adjusted net profits equal either to 50 cents per annum per Class A share or to a total of \$1,000,000; and such a holding is entirely without support in the evidence.

(c) The duration of the restrictions upon the Class B shares under the Articles of Incorporation depended upon different considerations than did the duration of the restrictions imposed upon the Class A shares under the Corporation Commissioner's permit. Under the Articles the Class B shares could in no event participate in dividends prior to July 1, 1942, and could participate thereafter on an equal basis with Class A shares only if adjusted net profits had then amounted to 50 cents per annum per Class A public share. Furthermore, under the Articles the Class B shares were junior to all Class A shares as to distribution of assets for a period of 5 years, a junior position which could have been terminated in less than 5 years only if the Company made adjusted net profits of \$1,000,000, thereby making the Class B shares convertible to Class A shares. The Corporation Commissioner's restrictions, being subject to less rigid conditions as to duration, could have been lifted, at least as to Class A shares, before the strict requirements of the Articles as to Class B shares had been met, and in fact approximately $\frac{1}{3}$ of the Class A promotional shares were released from the Corporation Commissioner's restrictions in November, 1940.

If the Class A shares had any value at all on March [61] 4, 1940, (which petitioners do not in the least concede), the Class B shares had a far smaller value, if any, and the value of the optioned Class B shares could in no event exceed 25 cents per share.

2. Wholly aside from the failure to differentiate between Class A and Class B shares as to value, the Division erred in determining that either the Class A or the Class B shares were worth \$4 per share, or any amount, on March 4, 1940.

(a) The finding of value is based almost wholly upon one isolated exchange by Ellsworth (who was not connected with the Company's management). That exchange (1) occurred more than 3 months prior to the valuation date, (2) was the result of personal solicitation and negotiation over a period of 90 days with a party particularly interested in Southern California aviation stocks, (3) involved less than 5% of the number of shares held by petitioners, and (4) involved payment of a 12% commission to the intermediary negotiating the transaction. These peculiar and unusual circumstances deprive that transaction of any substantial weight as evidence of fair market value.

(b) Despite the fact that respondent presented no evidence (aside from stipulated facts), the Division disregarded the uncontradicted testimony of petitioners' two expert witnesses that, in view of the restrictions and the speculative nature of the stock, neither the [62] Class A nor Class B promotional shares had any fair market value on March 4, 1940.

(c) The Division apparently disregarded the evidence as to the speculative nature of the stock, as

well as the numerous decided cases holding that restricted stock in a new and unproven corporation has no fair market value. The Court's attention is respectfully invited to *Helvering v. Tex-Penn Oil Co.*, (1937), 300 U.S. 481; *U.S. v. State Street Trust Co.*, (C.C.A. 1st, 1942), 124 F. (2d) 948, *aff'g.* 37 F. Supp. 846; *Schuh Trading Company v. Commissioner*, (C.C.A. 7th, 1938), 95 F. (2d) 404; and other cases cited in petitioners' opening brief, pp. 94-126.

Wherefore, it is prayed that this motion be granted.

Respectfully submitted,

MAYNARD J. TOLL,
SIDNEY H. WALL,
GEORGE F. ELMENDORF,

By /s/ SIDNEY H. WALL,
Counsel for Petitioners LaMotte T. Cohu, Didi M. Cohu, John K. Northrop, Inez H. Northrop, Gage H. Irving, Eleanor Salisbury Irving, Edward A. Bellande and Molly Lamont Bellande.

RAYMOND W. STEPHENS,
WESLEY G. LA FEVER,

By /s/ WESLEY G. LA FEVER,
Counsel for Petitioners Moye W. Stephens and Inez B. Stephens. [63]

Receipt of a copy of the foregoing motion is acknowledged this 1st day of May, 1947.

/s/ J. P. WENCHEL,
Chief Counsel Bureau of Internal Revenue, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed May 5, 1947. [64]

The Tax Court of the United States
Washington

Docket No. 5041

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court as set forth in its findings of fact and opinion promulgated April 9, 1947, the respondent herein filed a proposed recomputation of tax on June 11, 1947, and the petitioner filed an acquiescence therein on June 16, 1947. It appearing that such recomputation is correct it is, therefore, in accordance therewith,

Ordered and Decided: That there is a deficiency in income tax for the year 1940 in the amount of \$57,474.19.

(Seal) /s/ SAMUEL B. HILL,
 Judge. [65]

Entered June 18, 1947.

The Tax Court of the United States
Washington

Docket No. 5042

INEZ H. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court as set forth in its findings of fact and opinion promulgated April 9, 1947, the respondent herein filed a proposed recomputation of tax on June 11, 1947, and the petitioner filed an acquiescence therein on June 16, 1947. It appearing that such recomputation is correct it is, therefore, in accordance therewith,

Ordered and Decided: That there is a deficiency in income tax for the year 1940 in the amount of \$57,474.19.

(Seal) /s/ SAMUEL B. HILL,
Judge. [66]

Entered June 18, 1947.

In the Tax Court of the United States

No. 5039—LA MOTTE T. COHU,
No. 5040—DIDI M. COHU,
No. 5041—JOHN K. NORTHROP,
No. 5042—INEZ H. NORTHROP,
No. 5043—GAGE H. IRVING,
No. 5044—ELEANOR SALISBURY IRVING,
No. 5045—EDWARD A. BELLANDE and
MOLLY LAMONT BELLANDE,
No. 5046—MOYE W. STEPHENS and
INEZ B. STEPHENS,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION

The parties hereto by their undersigned counsel of record hereby stipulate and agree that the following facts shall be taken as proved in the above-mentioned appeals upon the filing of this stipulation, subject to the right of any party to introduce other and further evidence not inconsistent with the terms of this stipulation, and to the right of any party to object at the time of the trial to the admissibility of any of the facts herein set forth on the grounds of irrelevancy or immateriality.

1. Petitioners John K. Northrop, Inez H. Northrop, Gage H. Irving, Eleanor Salisbury Irving, Edward A. Bellande, Molly Lamont Bellande, Moye W. Stephens, and Inez B. Stephens are now and at all

times material hereto were individuals residing in Los Angeles County, California.

2. Petitioners Inez H. Northrop, Eleanor Salisbury Irving, Molly Lamont Bellande and Inez B. Stephens are now and at all times material hereto were the respective wives of petitioners John K. Northrop, Gage H. Irving, Edward A. Bellande and Moye W. Stephens.

3. Petitioners LaMotte T. Cohu and Didi M. Cohu are now and at all times material hereto were husband and wife and are now residents of Los Angeles, California. [69]

4. The income tax returns of all the petitioners for the calendar year 1940 were filed with the Collector of Internal Revenue for the Sixth District of California. The income tax return of petitioner LaMotte T. Cohu for the calendar year 1939 was filed in a collection district in the State of New York.

5. The income tax returns of all the petitioners for the calendar years 1939 and 1940 were filed on a cash receipts and disbursements basis.

6. Respondent determined deficiencies in the income tax of the petitioners for the calendar year 1940 as follows:

Docket No.	Petitioner	Amount of Deficiency
5039	LaMotte T. Cohu	\$60,490.65
5040	Didi M. Cohu	22,047.92
5041	John K. Northrop	99,479.05
5042	Inez H. Northrop	99,479.04
5043	Gage H. Irving	15,694.14
5044	Eleanor Salisbury Irving	16,381.31
5045	Edward A. Bellande and Molly Lamont Bellande	5,833.34
5046	Moye W. Stephens and Inez B. Stephens	4,455.93

7. Petitioners John K. Northrop, LaMotte T. Cohu, Gage H. Irving, Edward A. Bellande, and Moye W. Stephens, together with T. T. Ellsworth, were the promoters of Northrop Aircraft, Inc., a California corporation (hereinafter referred to as the "Company").

8. The Company was incorporated under the laws of California on March 7, 1939.

9. Petitioner LaMotte T. Cohu has been chairman of the board of directors and general manager of the Company from its inception until the present time. His background and experience in the aviation industry prior to June 21, 1939, are as set forth on page 3 of the prospectus issued under date of June 21, 1939, a copy of which prospectus is attached hereto, marked Exhibit 1-A, and made a part hereof.

10. Petitioner John K. Northrop has been the president and a director of the Company from its inception until the present time. His background and experience in the aviation industry prior to June 21, 1939, are as set forth on page 4 of the prospectus attached hereto as Exhibit 1-A.

11. Petitioner Gage H. Irving has been vice [71] president and a director of the Company from its inception until the present time. His background and experience in the aviation industry prior to June 21, 1939, are as set forth on page 4 of the prospectus attached hereto as Exhibit 1-A.

12. Petitioner Edward A. Bellande was a director of the Company from its inception until on or about October 16, 1941. His background and experience in the aviation industry prior to June 21, 1939,

are as set forth on page 4 of the prospectus attached hereto as Exhibit 1-A.

13. Petitioner Moye W. Stephens became assistant secretary of the Company on February 8, 1940, and a director of the Company on April 16, 1940, and continued in these capacities until on or about January 30, 1946. He commenced flying in 1921 and has been connected with the aviation industry as a transport pilot and in other capacities almost continuously since 1929. In 1937 he represented Lockheed Aircraft Corporation as a special sales representative in Australia and New Zealand.

14. The articles of incorporation of the Company, as amended June 14, 1939, and as in force and effect at all times material hereto, are attached hereto, marked Exhibit 2-B, and made a part hereof. [72]

15. Said articles of incorporation authorize the Company to issue two classes of shares of stock to be designated, respectively, Class A Common and Class B Common.

16. On June 15, 1939, the Commissioner of Corporations of the State of California issued his permit (hereinafter sometimes referred to as the "Corporation Commissioner's Permit") authorizing the Company to sell and issue certain of its securities. A copy of said permit is set forth on page 13 of the prospectus attached hereto as Exhibit 1-A.

17. By separate contracts dated June 17, 1939, between the Company and the respective individual parties thereto, the Company agreed to issue certain Class A Common shares and Class B Common shares of the Company to petitioners John K. Northrop, LaMotte T. Cohu, Gage H. Irving, Edward A. Bel-

lande and Moye W. Stephens, and to T. T. Ellsworth, in the amounts and for the considerations and on the terms and conditions set forth in said contracts, copies of which are attached hereto, marked Exhibits 3-C, 4-D, 5-E, 6-F, 7-G, and 8-H, respectively, and made a part hereof.

18. The Company and certain underwriters made and entered into an underwriting agreement dated June 17, [73] 1939, the provisions of which are summarized on pages 10, 11 and 12 of the prospectus attached hereto as Exhibit 1-A.

19. Amendments to said underwriting agreement dated June 17, 1939, were executed by the parties thereto as of July 12, 1939, and August 15, 1939. Such amendments are summarized on page 15 of the prospectus attached hereto as Exhibit 1-A.

20. The Company issued a prospectus dated June 21, 1939, and added thereto certain supplemental information dated April 26, 1940. A copy of said prospectus, including such supplemental information, is attached hereto, marked Exhibit 1-A, and made a part hereof.

21. During 1939 Atlas Corporation purchased from said underwriters and paid for certain shares and warrants of the Company, in the amounts, for the consideration, and upon the terms and conditions set forth on page 15 of the prospectus attached hereto as Exhibit 1-A.

22. A total of 250,000 of the Company's Class A Common shares (together with warrants for the purchase of 103,333 Class A Common shares) were issued by the Company and were accepted and paid for in cash by said several underwriters upon the dates and

in the amounts set forth in the schedule attached hereto, marked Exhibit 9-I, and made a [74] part hereof.

23. The Company received cash proceeds from the sale of each of the said 250,000 of its Class A Common shares on the dates that said shares were accepted and paid for by said underwriters as set forth in said Exhibit 9-I. The total cash proceeds received by the Company from the sale of said shares and warrants amounted to \$1,250,000.

24. A true copy of Chapters 7 and 9, of a portion of Section 3 of Chapter 2, and of Section 1 of Chapter 10 of the Rules and Regulations of the Division of Corporations, Department of Investment, of the State of California, as in effect during the period from June 1, 1939, to December 31, 1940, is attached hereto, marked Exhibit 10-J, and made a part hereof.

25. None of the Company's Class B shares became convertible to Class A shares prior to August 1, 1942, nor were any of said Class B shares converted to Class A shares prior to August 1, 1942. On August 1, 1942, pursuant to the provisions of Article Five (c)(1) of the articles of incorporation attached hereto as Exhibit 2-B, all Class B shares became convertible, share for share, into Class A shares, by reason of the fact that the Company's adjusted net profits (as defined in Article Five (a)(4) of said articles of incorporation, Exhibit 2-B) computed from August 1, 1941, amounted to more than \$1,000,000. [75]

26. The board of directors of the Company, by resolution adopted June 17, 1939, a copy of which is attached hereto, marked Exhibit 11-K, and made a part hereof, designated Bank of America National

Trust and Savings Association, a bank with trust powers, as escrow holder for the Class A and Class B shares required to be held in escrow by said Corporation Commissioner's Permit, referred to in paragraph 16 above.

27. A copy of a letter dated September 26, 1939, from the Commissioner of Corporations to O'Melveny, Tuller & Myers, counsel for the Company, concerning the conditions set forth in said Corporation Commissioner's Permit, is attached hereto, marked Exhibit 12-L, and made a part hereof.

28. A copy of a letter from O'Melveny, Tuller & Myers, dated September 28, 1939, replying to said letter from the Commissioner of Corporations dated September 26, 1939, is attached hereto, marked Exhibit 13-M, and made a part hereof.

29. The Company, by letter dated January 4, 1940, a copy of which is attached hereto, marked Exhibit 14-N, and made a part hereof, notified said Bank of America National Trust and Savings Association of its designation and requested acceptance by said bank of its appointment as escrow holder. [76]

30. By letter dated January 6, 1940, addressed to said Commissioner of Corporations, a copy of which is attached hereto, marked Exhibit 15-O, and made a part hereof, said bank accepted said appointment as escrow holder.

31. An agreement, dated as of November 30, 1939, and executed by the parties thereto on or about January 4, 1940, was made and entered into between the Company and John K. Northrop, LaMotte T. Cohu, Gage H. Irving, Edward A. Bellande, Moyer W. Stephens, and A. H. Smith (Smith having succeeded

to the rights of T. T. Ellsworth as hereinafter more particularly set forth). A copy of said agreement is attached hereto, marked Exhibit 16-P, and made a part hereof. An executed counterpart of said agreement was filed by the Company with the Commissioner of Corporations on or about January 22, 1940.

32. A copy of a letter dated January 22, 1940, from O'Melveny & Myers, counsel for the Company, to said Commissioner of Corporations transmitting the Company's application for approval of the Bank of America National Trust and Savings Association as escrow holder of the promoter's stock is attached hereto, marked Exhibit 17-Q, and made a part hereof.

33. On January 25, 1940, said Commissioner of Corporations issued his order approving the Bank of America National Trust and Savings Association as escrow holder for the Class A Common shares and Class B Common shares of the Company required to be held in escrow.

34. Pursuant to the provisions of the agreements dated June 17, 1939, (referred to in paragraph 17 above), and pursuant to the provisions of the Corporation Commissioner's Permit dated June 15, 1939, (referred to in paragraph 16 above), the Company on March 4, 1940, issued certificates to Class A Common shares and Class B Common shares of the Company in the following names and in the following respective amounts:

Name	Class A	Class B
John K. Northrop	15,384	38,461
La Motte T. Cohu	7,692	11,538
Gage H. Irving	4,615	10,769
Edward A. Bellande	1,538	2,307
Moye W. Stephens	1,538	2,307
A. H. Smith	1,538	2,307

All said certificates were on the same day placed in escrow with Bank of America National Trust and Savings Association, Los Angeles, California. [78]

35. The receipt of said Bank of America National Trust and Savings Association, for said certificates, as escrow holder, was filed with said Commissioner on or about March 4, 1940.

36. A copy of an application by the Company to the Commissioner of Corporations, dated October 22, 1940, together with all exhibits thereto, is attached hereto, marked Exhibit R, and made a part hereof.

37. By an order dated November 19, 1940, said Commissioner of Corporations ordered 11,000 of the Class A shares then held in escrow to be released from said escrow to the following named persons and in the following respective amounts:

Name	Class A Shares
	Released
John K. Northrop	5.240
La Motte T. Cohu	2.620
Gage H. Irving	1,580
Edward A. Bellande	520
Moye W. Stephens	520
A. H. Smith	520

38. All of the Class A and Class B Common shares referred to in paragraph 34 above, except for the 11,000 Class A Common shares which were released in November, 1940, pursuant to the afoersaid order of the Commissioner of Corporations dated November 19, 1940, were held in escrow until October 26, 1942, on which date all remaining shares were released from escrow in accordance with an "Order Terminating Escrow" issued by said Commissioner of Corporations on said date.

39. The balance sheet of the Company as of February 29, 1940, a copy of which is attached hereto, marked Exhibit 18-S, and made a part hereof, shows the book value of the Company's then outstanding 282,305 Class A shares and 67,689 Class B shares to be \$1,309,436.38.

40. On March 4, 1940, the Company had unfilled orders of \$760,249.16, consisting solely of one contract dated December, 1939, with Consolidated Aircraft Corporation for the manufacture of seats, cowls, and empennages for United States Army and Navy airplanes.

41. Up to and including March 4, 1940, the Company had made no sales deliveries, and made no such sales deliveries until April, 1940, in which month it made deliveries totaling \$406.98. [80]

42. On March 1, 1940, the Company had 142 employees and during the month of March, 1940, increased the number of its employees from 142 to 192.

43. On or about February 15, 1940, the Company completed the erection of its factory in Hawthorne, California, said factory having approximately 122,500 square feet of floor space.

44. The Company's balance sheet as of July 31, 1940, a copy of which is attached hereto, marked Exhibit T, and made a part hereof, shows the book value of the Company's then outstanding 282,305 Class A Common shares and 67,689 Class B Common shares to be \$1,199,174.93.

45. The Class A Common shares of the Company that were sold to the public and upon which there were no restrictions or limitations as to sale, divi-

dends or rights to participate in distribution of assets (hereinafter called "unrestricted Class A Common Shares"), were never during 1939 or 1940, traded or listed on any securities exchange, but were traded on an "over the counter" basis through securities dealers.

46. The number of unrestricted Class A Common shares purchased and sold by Lester & Co., a Los Angeles [81] securities dealer and one of the underwriters of the shares of the Company, during the period November 9, 1939, to March 8, 1940, and the prices at which such shares were purchased and sold, are set forth in Exhibit 19-U attached hereto and made a part hereof.

47. The number of unrestricted Class A Common shares purchased and sold by said Lester & Co., during November, 1940, and the prices at which such shares were purchased and sold, are set forth in Exhibit V attached hereto and made a part hereof.

48. During 1940 the highest price at which any such unrestricted Class A Common shares were purchased or sold by said Lester & Co., was \$8 in April, 1940, and the lowest price at which any such shares were purchased or sold by said Lester & Co., was \$5 in May, 1940.

49. During the period commencing November 9, 1939, and continuing through the year 1940, there was trading by securities dealers in warrants for the purchase of unrestricted Class A Common shares. Each of said warrants entitled the holder thereof to purchase one Class A Common share at any time on or before December 1, 1944, at the higher of the following prices: (a) \$7.00 per share, or (b) an amount

equal to 80% of the book value of one share [82] of such stock at the end of the quarterly period next preceding the date of exercise.

50. During the period from November 9, 1939, to and including March 10, 1940, said Lester & Co. purchased 196 such warrants and sold 150 such warrants at prices ranging from \$2-1/8 to \$3-1/4 per warrant, the average price per warrant being \$2.175.

51. During the period from March 11, 1940, to and including December 31, 1940, said Lester & Co. purchased 3,290 such warrants and sold 3,283 such warrants at prices ranging from \$2 to \$4 per warrant, the average price per warrant being \$3.43.

52. On November 28, 1939, the following transaction was consummated through White, Wyeth & Co., a Los Angeles securities firm, acting as a principal: T. T. Ellsworth assigned to A. H. Smith, a resident of Houston, Texas, his contract with the Company dated June 17, 1939, (Exhibit 8-H); A. H. Smith delivered to White, Wyeth & Co., 2,500 shares of Duval Texas Sulphur Co., of which 2,200 shares were transferred to T. T. Ellsworth in exchange for his said contract, and 300 shares were retained by White, Wyeth & Co. as its profit in the transaction.

53. On said date of November 28, 1939, T. T. Ellsworth sold 600 of such shares of Duval Texas Sulphur Co. [83] at a price of 7-1/8, for which he received \$4,251.00 on November 29, 1939.

54. Attached hereto, marked Exhibit 20-W, and made a part hereof, is a copy of the ledger accounts of T. T. Ellsworth and A. H. Smith with White, Wyeth & Co. relating to said transaction.

55. The following sales of Duval Texas Sulphur

Commissioner, by order dated July 31, 1940, consented to the transfer of said shares in accordance with said application upon the [86] condition that the new certificates evidencing such shares be deposited with Bank of America National Trust and Savings Association and held in escrow in accordance with the conditions of said Corporation Commissioner's Permit dated June 15, 1939, and upon the further condition that the old certificate or certificates be immediately cancelled.

62. The first meeting of the shareholders of the Company was held on October 16, 1940.

Dated November 12, 1946.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

MAYNARD J. TOLL,
SIDNEY H. WALL and
GEORGE F. ELMENDORF,

By /s/ SIDNEY H. WALL,
Counsel for Petitioners LaMotte T. Cohu, Didi M. Cohu, John K. Northrop, Inez H. Northrop, Gage H. Irving, Eleanor Salisbury Irving, Edward A. Bellande and Molly Lamont Bellande.

RAYMOND W. STEPHENS and
WESLEY G. LA FEVER,

By /s/ WESLEY G. LA FEVER,
Counsel for Petitioners Moye W. Stephens and Inez B. Stephens.

[Endorsed]: T.C.U.S. Filed Nov. 12, 1946. [87]

The Tax Court of the United States

[Title of Causes Nos. 5039-40-41-42-43-44-45-46.]

Court Room No. 229, United States Post Office and
Court House Building,

Los Angeles, California.

November 12, 1946—10:00 A.M.

(Met pursuant to notice.)

Before: Honorable Samuel B. Hill, Judge.

Appearances: Sidney H. Wall and George F. Elmendorff, 433 South Spring Street, Los Angeles 13, California, appearing for Petitioners in Docket Nos. 5039 to 5045, inclusive. Wesley G. LaFever, 1122 California Bank Building, Los Angeles, California, appearing for Petitioners Moye W. Stephens and Inez B. Stephens, Docket No. 5046. R. E. Maiden, Jr., (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [92*]

The Clerk: Docket No. 5039 LaMotte T. Cohu, 5040, Didi M. Cohu, 5041, John K. Northrop, 5042, Inez H. Northrop, 5043, Gage H. Irving, 5044, Eleanor Salisbury Irving, 5045, Edward A. Bellande and Molly Lamont Bellande, 5046, Moye W. Stephens and Inez B. Stephens.

The Court: Announce your appearances.

Mr. Wall: Sidney H. Wall for the Petitioners in Docket Nos. 5039 to 5045, inclusive.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Mr. Maiden: R. E. Maiden, Jr., for the Respondent.

Mr. Elmendorf: George F. Elmendorf for the Petitioners in Docket Nos. 5039 to 5045, inclusive.

The Court: How about 5046?

Mr. Wall: Mr. Wesley G. LaFever, your Honor, has entered his appearance for the Petitioners in that case, and I have just called his office and he is on his way here.

The Court: For the Respondent?

Mr. Maiden: R. E. Maiden, Jr., for the Respondent, your Honor.

The Court: Are these cases to be consolidated for the hearing?

Mr. Wall: If your Honor please, I should like to so move at this time, that they be consolidated.

The Court: Does that include 5046?

Mr. Wall: Yes, that includes Docket No. 5046, and [93] Mr. LaFever has advised both Mr. Maiden and myself that he joins in that motion.

The Court: Any objection to the motion?

Mr. Maiden: No object, your Honor. I think it is proper.

The Court: They may be consolidated for hearing.

Mr. Wall: Will that also include consolidation for the purpose of brief, your Honor? I suppose it will.

The Court: Yes, it will. State your case for the Petitioners. [94]

Mr. Wall: If your Honor please, the parties have entered into a rather lengthy stipulation of

facts, which I have already mentioned. There are certain portions of this stipulation on which the Petitioners, however, reserve an objection to materiality. We do not question the existence of these facts, and we have gladly stipulated to them but we do wish to reserve an objection as to their admissibility in this proceeding. I should like to present the stipulation at this time, and if your Honor cares to hear the argument on the question of the admissibility, I would be happy to go forward with that.

The Court: You have noted in the stipulation at the proper points, I take it, your objections?

Mr. Wall: No, your Honor, the objections are not specifically noted in the stipulation, I am sorry to say. The entire stipulation was made subject to the right of either [95] parties to object to the relevancy.

The Court: You may indicate your objections at this time. I do not care to have that argued or to pass on them at this time.

Mr. Wall: Well, the Petitioners object to the admissibility in evidence of the following provisions of the stipulation: Paragraph 36 and Exhibit R. Would you want me to mention briefly what the nature of the facts are in each case?

The Court: You may mention briefly, but do not take too much time on it.

Mr. Wall: That is Petitioners application to the Corporation Commissioner for release of the escrow dated October 22, 1940. We object to paragraph 44 and Exhibit T incorporated thereby, which is

a balance sheet of the company as of July 31, 1940. We object to paragraph 47 and to Exhibit V, incorporated therein which constitutes a tabulation of the sales and purchases of the Northrop Class A public shares handled by Lester & Company during the month of November, 1940. We object to paragraph 48 which states the high and low prices in the 1940, of the unrestricted Class A shares, and object to paragraph 51, which is a summary of the sales and purchases of warrants handled by Lester & Company for the period March 11, 1940, to December 31, 1940. We object to paragraph 61, which relates to an [96] application made on July 26, 1940, by LaMotte T. Cohu to the Corporation Commissioner for permission to transfer certain of his Class C shares to his wife and daughters by way of gift.

I might state very briefly, your Honor, that our objection to all of these items is based on the fact that all of them occurred or followed the facts occurring after March 4, 1940. We object to their being considered in determining the fair market value of these shares as of March 4, 1940, unless and until some proper foundation is laid showing that they were either foreseen or reasonably foreseeable at that valuation date. Subject to the objections that I have just mentioned, I will renew the offer of the filing and—I guess the filing is all that is necessary.

The Court: The stipulation will be received.

Mr. Maiden: If the Court please, I was just wondering if the Court would want to take the

time to have me state Respondent's reasons for believing that the facts and circumstances in this case occurring both before and subsequent to our basic date are material evidence in the case, or whether the Court would prefer that I cover the points of objections in my brief.

The Court: I think it would be just as well to cover them in your brief. Of course if you should make your statement now the Petitioner would be entitled to give him [97] reasons for his objections.

Mr. Maiden: It is understood that both sides in their brief will have ample opportunity.

The Court: Either party. That is a good way to argue the question.

Mr. Maiden: That is satisfactory to me, your Honor.

Mr. Wall: That is satisfactory to me, your Honor. I would like clarification on one point, in view of the fact that we will not know during the hearing whether or not those items are to be admitted, I will be in this position, that if those items are admitted there are certain facts I may wish to bring out from witnesses produced on behalf of the Petitioners, which likewise relate to events subsequent to March 4, 1940.

The Court: You may do that without prejudice to your objections.

Mr. Wall: Thank you, your Honor, may I proceed with the evidence?

The Court: You may proceed.

Mr. Wall: I will call Mr. Claude M. Monson.

Whereupon,

CLAUDE M. MONSON,

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows: [98]

The Clerk: State your name and address, please.

The Witness: Claude M. Monson, 425 West Buckthorne, Inglewood, California.

Direct Examination

By Mr. Wall:

Q. Will you please state your business or occupation, Mr. Monson?

A. I am the Financial Vice President of Northrop Aircraft, Inc.

Q. When did you enter the employ of Northrop Aircraft, Inc.?

A. Actual employment of this company, October 9, 1939.

Q. Had arrangements been made prior to that date for your employment by the company?

A. Yes, sir, I was contacted around the first of March, 1939, relative to coming to work for them and had accepted at that time.

Q. But you actually began your active work in October? A. That is right.

Q. Have you been with the company ever since that time? A. Yes, sir.

Q. What was your position with the company when you began in October, 1939?

A. I came in as Auditor of the company.

(Testimony of Claude M. Monson.)

Q. How long did you continue to hold that position? [99]

A. For a very few months. I was made Assistant Treasurer in January of 1940, somewhere in January.

Q. Was there a Treasurer of the company at that time? A. No, sir, there was not.

Q. Were you then chief financial officer of the company beginning in January, 1940?

A. Yes, sir.

Q. And did you hold that position until on or after March 4, 1940? A. Which position?

Q. Assistant Treasurer. A. Yes, sir.

Q. What other positions have you held in the company since that time?

A. Well, from there I was advanced to the position of Treasurer and then I became Vice President and Treasurer and I was made a member of the Board of Directors and the Financial Vice President.

Q. You are now Financial Vice President and a member of the Board of Directors?

A. Yes, sir.

Q. Going back to the period around March 4, 1940, you have testified, Mr. Monson, that you were then Assistant Treasurer of the company and its Chief Financial Officer by reason of the fact that the office of Treasurer was vacant. [100] In that position were you then familiar with the financial condition and affairs of the Northrop Aircraft, Inc.? A. Yes, sir.

(Testimony of Claude M. Monson.)

Q. And were you also familiar with its business and prospects for business as of that time?

A. Yes, sir.

Q. In answering the next question that I am going to put to you, Mr. Monson, I would like to have you put yourself as nearly as you can at March 4, 1940, and answer that with respect to conditions as they existed then. On March 4, 1940, did the Northrop Aircraft Company have a product ready for sale? A. No, sir.

Q. Did it have any airplanes then in the design stage?

A. Yes, they had. The company was organized in 1939. We immediately started a project design on a flying wing airplane. We had done a very small amount of work in sketching three-views for configurations of an airplane and the like on a machine we termed the 8A.

Q. That is Model 8A?

A. That is right.

Q. What type of airplane was that in general?

A. That would be a single-engine military craft which we hoped we could get orders for.

Q. You stated that you had begun to prepare three-views. [101] Will you explain to the Court what you mean by three-views?

A. Well, the three-view of an airplane shows the side view, the top view and the front view of the airplane.

Q. Does the preparation of the three-view involve special engineering work on the airplane?

(Testimony of Claude M. Monson.)

A. Oh, no, this three-view, the total cost of preparing the three-view on this——

The Court: What is that word?

The Witness: Three, t-h-r-e-e view.

The Court: I thought you said free f-r-e-e view.

The Witness: Three, t-h-r-e-e view, and those just run from \$50.00 to \$100.00 each.

Q. (By Mr. Wall): That was a mere preliminary step in designing an airplane?

A. That is right.

Q. Now you said that you had commenced to design a flying wing. How far had the design work progressed on the flying wing up to March 4, 1940?

A. Merely that it was just taking form on a piece of paper and studies were being made as to the design.

Q. Was the engineering by any means completed on that airplane?

A. No, it hadn't even been started, as far as the engineering goes. [102]

Q. Was the same true of this Model 8A which you mentioned? A. Yes.

Q. Had there been any provision for production of either of those airplanes?

A. No, sir.

Q. Did you have any airplanes at that time then in a design stage? A. No, sir.

Q. Did the company then have any orders on its books? That is, March 4, 1940?

A. Had a Consolidated Aircraft order.

(Testimony of Claude M. Monson.)

Q. That was the order of approximately \$760,000 total?

A. That is right, and it covered empennages on P. B. Y. 2 airplanes.

Q. Will you explain what the empennage of an aircraft is, Mr. Monson?

A. The empennage of an airplane is the tail section.

Q. Was that Consolidated Aircraft order on a fixed price basis? A. Yes.

Q. I think it is in evidence that the order was dated December, 1939. Does that check with your recollection, Mr. Monson?

A. That is right, yes.

Q. Will you please state the circumstances under which [103] that Consolidated order was obtained by Northrop?

A. Well, we had an organization started, the nucleus of an organization. We had our plans pretty well along and it was discussed and determined that we should go out and try to get some subcontract work for some of the other aircraft manufacturers, for the purpose of defraying some of the overhead of the organization until such time as Northrop Aircraft could design and get a product for sale. In order to get this business we had figured our estimates as low as we possibly could, on the basis of a break-even point, and had taken the job merely to defray the overhead expenses while we were getting going. That was the estimated basis.

(Testimony of Claude M. Monson.)

Q. You say it was estimated to an estimated break-even point, or it was price at an estimated break-even point. What do you mean by that?

A. I mean just what we thought we could do the job for and not make any profit.

Q. Did you not at the time when the order was obtained anticipate making a profit on that order?

A. No, sir, because we could not risk getting in there with a profit margin on it, because the rest of the industry could take that much business away from us so we had gone in purely on that basis.

Q. And that was the only order you had on your books on March 4, 1940? [104]

A. That is right.

Q. Had you prior to that time sought sub-contract work of other aircraft companies?

A. Oh, yes, naturally we had been to all of the aircraft companies here on the West Coast and told them that we were looking for their sub-contract work.

Q. You had not then received any orders?

A. No, we hadn't received any orders.

Q. Did you have any immediate prospect on March 4, 1940, of receiving orders from other aircraft companies? A. No, sir.

Q. What was the general competitive situation facing the Northrop Aircraft Company as of March 4, 1940?

A. Well, out in this area we had Douglas Aircraft, North American Aviation, Vultee Aircraft,

(Testimony of Claude M. Monson.)

Consolidated, Boeing, who all old-established aircraft companies, had operating plant facilities, employees, products to sell. We came in as youngsters into this group of organized aviation companies to try to make out. I think that I could illustrate just what the competition was. We had word of a Navy order coming up in the East, and we had made our proposals as to what we could build this Navy airplane for. We had gone to a lot of work and had bid the thing as close as we could and we were assured by those people in power in Washington that this order would be accepted. We found that our competitors put [105] in a written note to the Bureau of Aeronautics to the effect that Northrop neither had a plant nor a personnel in the plant to produce the product, so it was pulled right out from under our hands and given to one of our biggest competitors.

Q. Was that prior to March 4, 1940?

A. It was either prior or right after.

Q. You named several aircraft companies that you considered to be established out on the Coast. Could we also mention Lockheed Aircraft Corporation?

A. Oh, yes, I just skipped them.

Q. What was the outlook as of March 4, 1940, with respect to possible profits of the company?

A. We hadn't anticipated any profits in 1940 at all. We could not on the basis of the business that we had on hand.

Q. Had you then had enough experience in

(Testimony of Claude M. Monson.)

working on the Consolidated sub-contract order to know whether or not you were going to make a profit on that?

A. Well, that developed rather rapidly. The P. B. Y. 2 airplane which Consolidated were manufacturing was an obsolete airplane in the first place, and it was agreed that they would furnish the drawings and the tooling with which we would make the empennages. As this tooling and the drawings came to our plant, in order to properly put them together to work we found that considerable additional work would [106] have to be done to bring the drawings up-to-date, to make changes all the time in order for us to put out a satisfactory product, so immediately after this stuff started coming in to us we knew then that we were going to run a loss on that particular contract.

Q. Was that your view on March 4, 1940?

A. Yes, sir.

Q. Mr. Monson, did the company receive an order from the Norwegian Government for certain Navy airplanes shortly after March 4, 1940?

A. Yes, sir.

Q. Do you recall the date on which that order was received?

A. March 12, I believe.

Q. What was the nature of that order?

A. That order covered 24 N3PB airplanes.

Q. Would you translate that?

A. That is a Navy patrol bomber.

Q. Was that a single-engine airplane?

(Testimony of Claude M. Monson.)

A. Single-engine plane.

Q. Did you say 24 of those bombers?

A. 24.

Q. And you received that order on the 12th of March? A. Yes, sir.

Q. Was that known to the company on March 4th, 1940, [107] before you received that order?

A. No, it was not.

Q. Will you state the circumstances concerning the obtaining of that order and particularly the facts as they existed on March 4, 1940, and as known to you and to the company?

A. We knew that the Norwegian Purchasing Commission, if that happens to be its legal name, were here on the West Coast for the purpose of buying airplanes for the Norwegian Government. In our business you know who your competitors are and you knew where there people were. We knew that these people were dealing with Douglas Aircraft, that the Army section of this Commission had already placed an order with Douglas Aircraft for their product, and the Navy Department were definitely leaning that way. We went out and made an offer to the Norwegians as to what we would build 24 airplanes for. We did not know as of the 4th day of March whether or not that business would develop or whether it would not. Of that I am definitely certain because on or about the 10th or 11th of March Mr. Cohu decided to go back East for the purpose of seeing if he could do a little more selling and see the

(Testimony of Claude M. Monson.)

Commission and I says as he was leaving, "If we are successful, if there is any possible chance of getting this business, please let me know so that I can arrange for a performance bond" because performance bonds [108] and payment bonds are always necessary in the construction of airplanes, and he says "Well, there will be a lot of time for that, because we don't know." So I know the date.

Q. Did he later advise you that the order had been obtained, requesting you to get a performance bond?

A. Yes, he left by airplane, and weather conditions put him down in Texas somewhere or New Mexico, and he phoned me at eleven o'clock at night and informed me that he had been contacted and that the Norwegians would give us the business provided we could furnish the performance bond by next morning.

Q. When was that phone call made, to the best of your recollection?

A. That was the night of the 11th, the 10th or 11th, I couldn't say sure. So I got out at eleven o'clock at night and got a performance bond by two o'clock in the morning.

Q. Was there any business not then on the books of the company that might reasonably be anticipated as of March 4, 1940? A. No.

Q. There was nothing which you knew at that time which would lead you to believe that you

(Testimony of Claude M. Monson.)

were going to get any particular business or business at all, is that correct?

A. No, there was not. [109]

Q. Now you have mentioned this Consolidated order? A. Yes, sir.

Q. Which on March 4, 1940, was in the amount of \$760,000. Did the company actually make a profit or make a loss on that \$760,000 Consolidated order which was on its books on March 4, 1940?

A. The company took a loss.

Q. You have also mentioned this Norwegian contract. Did the company make a profit on the Norwegian contract or a loss? A. Loss.

Q. I assume that the Norwegian contract was not completed until sometime after 1940, is that correct?

A. That is right. It was not completed until 1941.

Q. When you first received the Norwegian contract did you then anticipate making a profit on it?

A. No. Well, yes, we may have anticipated making a small margin of profit, but 24 airplanes with tooling you can't consider very much.

Q. As of March 4, 1940, Mr. Monson, had the company made any earnings whatsoever?

A. No, sir.

Q. And had it declared or paid any dividends at that time? A. No, sir. [110]

Q. When did the company show earnings?

A. The fiscal year ended July 31, 1942.

(Testimony of Claude M. Monson.)

Q. What had those earnings showing a profit and loss position been on prior years?

A. The year 1940, inasmuch as our sales only amounted to two or three thousand dollars for the entire year, the books were closed and we took a loss on the basis of organization expenses and those things which had been paid out during the year.

Q. You mentioned the year ended 1940. Do you mean the fiscal year ended July 31, 1940?

A. Yes, the fiscal year ended July 1, 1941, and the company had a loss of some \$827,000.

A. When did the company first pay a dividend on its stock?

A. 1943, declared in November, 1943.

Q. Mr. Monson, I would like to show you Exhibit R attached to the stipulation on file which is an application to the Commissioner of Corporations of the State of California made by Northrop Aircraft, Inc., under date of October 22, 1940, in which the company requested the Commissioner to release from escrow approximately one-third of the Class A promotion shares which had been placed in escrow under the Commissioner's permit. I would like to direct your attention particularly to Exhibit B attached to the application which [111] is here designated as Exhibit R. Exhibit B to the application begins this way: "The following is a list of contracts held by the Northrop Aircraft, Inc., making a total backlog of \$24,000,000 odd." This then is a list of contracts

(Testimony of Claude M. Monson.)

said to be held by Northrop Aircraft on October 22, 1940. I direct your attention to Item No. 1 therein, dated March 12, 1940, for the Norwegian Government. Is that the Norwegian contract concerning which you have already testified?

A. Yes, sir.

Q. I direct your attention to Item No. 2, Experimental Contract dated June 29, 1940, by the United States Navy covering design data for a contract price of \$35,302.50. Can you state whether or not that contract which was dated June 29, 1940, for the Navy was foreseen on March 4, 1940?

A. No, sir, it was not. The bid circular on that particular one was not circulated until about April.

Q. You mean then that you did not place that bid until some time after that circular was issued?

A. That is right.

Q. I call your attention to Item No. 3, Experimental Contract for the United States Army, dated April 29, 1940, relating to magnesium wing design, etc., for a total contract price of \$17,640.00. Was that contract foreseen on March 4, 1940?

A. No, sir. [112]

Q. I call your attention to the item of an Experimental Contract dated May 6, 1940, for the United States Army, for the design of a bomber for a total contract price of \$15,920.00. Was that contract foreseen on March 4, 1940?

A. I think in February we had put up a \$100,000 bid deposit.

(Testimony of Claude M. Monson.)

Q. Had you made a bid on that job in February? A. Yes, sir.

Q. Had you done any work prior to March 4, 1940, as to making an airplane for that Army job? A. No, sir.

Q. I call your attention to Item No. 6 Experimental Contract dated September 4, 1940, with the United States Army for the design and construction of a prototype pursuit plane for a total contract price of \$404,600.00. Was that contract anticipated or foreseen on March 4, 1940?

A. No, sir, that contract originally started out for \$11,000.00 for some wind tunnel models and drawings, and later on was supplemented to the prototype of the pursuit airplane, but contracts when they are supplemented always bear the original date.

Q. When did you do the first work on the wind tunnel job which you say started that job?

A. It started about in June, I believe.

Q. Was that contract anticipated or foreseen on [113] March 4, 1940?

A. No, sir, it was not.

Q. I direct your attention to Item No. 7 on this list Experimental Sub-contract dated June 3, 1940, with E. F. Zap relating to flaps and ailerons for the United States Navy, price \$32,500.00. Was that contract foreseen or anticipated on March 4, 1940?

A. I don't know. Mr. Zap was a gentleman who was doing some development work in our plant

(Testimony of Claude M. Monson.)

and we let him have the corner office to do some work around there. Now, then he got his contract from the Navy and when he gave us this sub-contract work, outside of the date that you have mentioned to me I don't know?

Q. He was using rented space in your plant to work on his own on March 4th?

A. He was using one office.

Q. I call your attention to Item No. 8, contract dated December 29 with the Consolidated for empennages on United States Army planes, for a total contract price of \$1,498,000 odd. Is that the Consolidated contract concerning which you have already testified?

A. No, sir. As I said first, the original Consolidated P. B. Y. 2 was an obsolete airplane, and after April or somewhere in there, when the Government decided to drop the airplanes they had on order, that ship was revised and this [114] is an additional order for empennages.

The Court: What was the year?

The Witness: In 1940, around April or May.

The Court: I thought you said 1939?

Mr. Wall: The contract is dated December, '39.

Q. (By Mr. Wall): But is it correct, Mr. Monson, that it was later supplemented in 1940 after March 4th for the additional items?

A. That is right.

Q. But the contract so supplemented still bore its original date?

A. That is right.

(Testimony of Claude M. Monson.)

Q. The original order of \$760,000 was part of this \$1,498,000, or was that added to the original one?

A. I am sure it is in addition to. It may be an addition that. Yes, this includes the \$790,000.

Q. \$760,000?

A. Yes, and the additional is for the sides and cowls.

Mr. Maiden: Is that Item No. 8 you are referring to?

Mr. Wall: Yes.

Q. (By Mr. Wall): I wish now to call your attention to Item No. 9, contract dated September 19, 1940, for the British Government, to manufacture 24 Vultee V72 dive bombers under license agreement with Vultee Aircraft Company for a total contract price of \$17,000,000 odd. That contract was dated September 19, 1940. Was that contract foreseen or anticipated on March 4, 1940?

A. No, sir.

Q. Can you state the circumstances under which that contract was obtained?

A. Well, the V72 airplane is a Vultee product and I know that Vultee had an order for 40 of such airplanes.

Q. From whom?

A. From the British Government, and the British Government approached Vultee in approximately July of 1940 and asked them to increase the order to 60. Vultee then were not in a position at that time to take the 200 and we contacted

(Testimony of Claude M. Monson.)

them and asked for a license right to make them for the British, and that originally was upon the basis of a license agreement with Vultee, but later we got a license agreement and we did enter into the contract with the British Government.

Q. Approximately when did you contact Vultee seeking that business?

A. I would say July or August.

Q. Did you know that the business might even possibly be available prior to July, 1940?

A. No, no. [116]

Q. Now I will direct your attention to the last item, Item No. 10, Contract dated October 8, 1940, with Boeing Aircraft to manufacture cowl for the Flying Fortress Bombers, total contract \$3,500,000. Was that contract anticipated by the company on March 4, 1940?

A. No, sir, it was not.

Mr. Wall: No further questions.

The Court: Let us take a recess.

(Whereupon, a short recess was taken.)

The Court: Proceed.

Cross-Examination

By Mr. Maiden:

Q. Mr. Monson, with whom were you connected and in what connection prior to going with Northrop in March of 1939, or whatever date it was?

A. October of 1939. Douglas Aircraft.

Q. In what capacity?

A. Internal Auditor.

(Testimony of Claude M. Monson.)

Q. Are you a man of some aviation background or some experience in aviation, or were you at that time?

A. Yes, I started in 1934 with the old Northrop Corporation.

Q. What were your duties?

A. In 1934 I started there as a sheet metal man. I had previously been an accountant, but I started in 1934 as [117] a sheet metal man, due to conditions, and worked up through the Payroll Department where I became in charge of all the accounting at the old Northrop Corporation. In 1937, when Douglas took over the old Northrop Corporation, I remained on the—went with the Douglas people as the auditor for the Northrop Division or the El Segundo Division.

Q. What was the old Northrop Company? What business was it engaged in?

A. Building airplanes and airplane parts.

Q. Did Mr. John R. Northrop have any connection with that company?

A. Yes, sir.

Q. Did he have an official position with them?

A. Yes, Mr. Northrop was the president of the old Northrop Corporation.

Q. Was the old Northrop Corporation at all times a subsidiary of Douglas?

A. Yes, sir. Well, correction I guess. It was the Northrop Corporation. Douglas held the controlling stock, so it was not a subsidiary.

Q. Then you had been acquainted in October of

(Testimony of Claude M. Monson.)

1939 with Mr. John R. Northrop for a number of years?

The Court: Is it John K. or John R.?

The Witness: John K.

Mr. Maiden: John K. Northrop for a number of years? [118] Is that correct, Mr. Monson?

A. Yes, sir.

Q. (By Mr. Maiden): Do you know with what regard Mr. Northrop was held in the aircraft industry as a designer and engineer of aircraft?

A. Yes, sir.

Q. What was that?

A. I think that he held Number One position, practically.

Q. Would you say that Mr. John K. Northrop was considered to be an outstanding designer and engineer in the aircraft industry?

A. Personally, yes.

Q. Was that reputation generally held?

A. I think that it is.

Q. Now, were you employed by Douglas at the time you became connected with Northrop, that is, the new corporation we are speaking of?

A. I was employed by Douglas when I was contacted by the new Northrop Aircraft.

Q. Who contacted you?

A. Mr. Gage Irving.

Q. Was he one of the promoters of the corporation? A. Yes, sir.

Q. Was he a man of some experience in the aircraft [119] industry? A. Yes, sir.

(Testimony of Claude M. Monson.)

Q. Were you acquainted at that time with Mr. Cohu? A. No, sir.

Q. You were not?

A. I never met Mr. Cohu until maybe September or October of 1939.

Q. When you were contacted by Mr. Irving, just briefly, what did he say to you? What did he tell you about coming with Northrop?

A. Well, Mr. Irving contacted me and said that they were thinking about starting a new aircraft company with Jack Northrop as president of it, that they would like to have me under the same roof with them, but because of expenses financially they could not pay me any more than I was getting from my present job, but if I was willing to come with them they would like to have me.

Q. Mr. Monson, did you have a great deal of faith in Mr. Northrop's ability to design, develop and manufacture airplanes? A. Yes.

Q. That faith that you had in him, I guess, was one of the weighty reasons that caused you to give up the employment with an old established corporation and accept employment with this new company, is that correct? [120]

A. That, sir, and a new organization had a gambling chance.

Q. In other words, you did consider it to be a gambling chance? A. I did, sir.

Q. Mr. Monson, what was the condition, if you know, of the aircraft industry in say beginning 1938

(Testimony of Claude M. Monson.)

and 1939 and the beginning of 1940? That is, was it on an upgrade or was it going down?

A. I have been in this thing for quite a number of years, and whenever somebody released a contract, all of the aviation industry fought over it. Whoever got it carried the employees, the actual workmen from the other company into the organization that had the then prevailing work. Now that has happened all the time, and you will find that the employees, mechanics, in the aviation industry have worked in every one of these companies out here, the old-timers, because it has always been a peak and valley affair and it was in 1938.

Q. Well, in 1939 wasn't there a steady up-climb in the demand for military aircraft in the industry in the United States?

A. Out here on the West Coast the only one that I knew of that was going up at that time was Lockheed, because they had some British contracts. [121]

Q. You are aware, Mr. Monson, of the fact that through 1938 and through 1939, war clouders had loomed pretty large on the international horizon, isn't that correct?

A. Yes, sir.

Q. You were aware, were you not, at the time you went with Northrop, that as a weapon of warfare, the airplane was and had for some time been considered by military powers as being one of the most decisive of military weapons, is that correct?

A. I was aware of the fact that that is what we thought of it and the Army Air Forces thought of it. I know there was some controversy with the Navy Department.

(Testimony of Claude M. Monson.)

Q. Do you know whether or not during 1939 prior to the outbreak of the European War on September 1, 1939, the European democracies were feverishly re-arming and were trying to build up their military air forces as fast as possible?

A. I think that is true, yes, sir.

Q. Did that condition obtain likewise in the United States in the latter part of 1939 and the first part of 1940?

A. It started in 1940, I believe.

Q. I believe the facts in this case show that this company was organized for the purpose of designing, developing and manufacturing aircraft and aircraft parts.

A. That is right, sir. [122]

Q. And I believe it was the expression intention of this particular company to specialize in the designing, the developing and manufacturing of military aircraft. Is that your understanding?

A. That is right, sir, that is right. The background on that is that Northrop has always been a military designer.

Q. Has always been a military designer?

A. Yes, sir.

Q. Didn't you feel, Mr. Monson, in 1939 when you were asked to come to Northrop, that Mr. Northrop by reason of his experience and by reason of his recognized leadership in the designing and engineering of military aircraft, that that would be a tremendous asset, his services in connection with the company would be a tremendous asset to that company?

A. Yes, sir, but in making my decision I took it

(Testimony of Claude M. Monson.)

this way, that I had been with this organization where I had been, and I had been told previously to March that I was as far as I would get in that corporation, because of the size of it, that from then on that my salary, if we want to put it that way, would be increased only because of my historical value to the company; all of the positions above me were filled. So, in making my decision to go with Jack, it was just Jack's ability, Mr. Northrop's ability and the chance, the gambling chance that I was taking starting with a new organization in the hopes that I may go farther. [123]

Q. Weren't you of the opinion that national and international relations had so developed that this new company would be successful and would expand and grow rapidly? Wasn't that your expectation when you went with the company in 1939?

A. No, the expectation of the company when I went with them in 1939 was never to have over about 220,000 sq. ft. of floor space and never to employ more than about 2,000 people, with the anticipation that if we could get out of the country some \$15,000,-000 worth of gross sales per year we would be satisfied. We never went with the——

Q. In other words, your corporation would be considered successful on that modest basis?

A. It would be a paying passenger, yes, sir.

Q. Mr. Monson, are you familiar with the prospectus put out by this corporation under date of June 21, 1939, with respect to some of the company's stock? That is Exhibit 1-A to the stipulation in the case.

(Testimony of Claude M. Monson.)

A. I would say that I am. I have seen them all. Yes.

Q. Now, Mr. Monson, I call your attention to a statement in this prospectus which reads as follows: "It is the intention of the company that upon the completion of its initial financing a further detailed survey will be made of the military requirements of the United States Government and foreign governments before definitely determining what type [124] or types of airplanes are to be developed."

Mr. Wall: May I ask what page you are reading from?

Mr. Maiden: That is on page 4 of the prospectus.

Mr. Wall: Thank you.

By Mr. Maiden:

Q. You did understand that the promoters of this company had made some investigation into the needs of the United States Government and other governments, with respect to the types and character of military aircraft that they would want?

A. Yes, sir.

Q. Now, I call your attention to this statement in the prospectus: "The progress of a particular company is determined in an unusual degree by the skill and judgment of its management and its engineering staff." Do you underwrite that statement, Mr. Monson? A. I do, sir.

Q. Did you consider in October of 1939 when you became connected with Northrop that that company did have the skill and judgment necessary to the successful operation of a military aircraft plant?

A. Yes, sir.

(Testimony of Claude M. Monson.)

Q. You considered it A-1, didn't you, Mr. Monson? A. Yes, sir. [125]

Q. Now I likewise call your attention to this statement in reference to the activities of Mr. Northrop: "He has also travelled considerable distances and spent substantial time in conferring with members of the aircraft industry and persons in the military service of the United States and foreign governments, concerning the types aircraft in which they were interested." Did you understand that such a survey had been made by Mr. Northrop and the other members of his company at the time you came with them?

A. I think now you are speaking of the past experience of Jack Northrop.

Q. Well, this has to do, Mr. Monson, with the promotional services rendered by Mr. Northrop to this company in consideration for which he was to receive certain of the promotional shares.

A. Yes, that is right, yes.

Q. Now, Mr. Monson, would you say that after you came to Northrop in October of 1939, and more particularly as of March 4, 1940, that there was a steady and ever-increasing demand for military aircraft in the United States?

A. Oh, yes. I wouldn't say—yes, I guess that would be correct. 1940 is when it started uphill.

Q. I will ask you if the demand for military aircraft which was in existence prior to September 1, 1939, was not greatly accelerated by the outbreak of the European war on [126] September 1, 1939?

A. Yes, that is right.

(Testimony of Claude M. Monson.)

Q. Now, Mr. Monson, considering the fact that this company was built around a nucleus of men of wide and varied experience in the aircraft industry, headed by Mr. Northrop who was considered to be a leader in engineering and designing of military aircraft, considering the fact of the outbreak of the European war on September 1, 1939, and its far-reaching and profound influence upon the demand for military aircraft, not only as respects the defense program of the United States, but more particularly the European democracies who at that time were fighting the battle of their lives, considering the fact that the existing aircraft industry in the United States was not at that time geared to satisfy a degree of this increased demand brought on by the war, didn't you and your associates in Northrop as of March 4, 1940, have high hopes and great confidence and expectations with respect to getting a share of that business that would cause you to grow and expand rapidly and to develop into a successful company?

A. Well, the company was started in—the determination to start the company was made the early part of 1939. We tried to sell that same story to the Navy Department by giving them a long teletype, about four pages, as to our added years experience in the aircraft industry, to combat [127] our competitors saying that we did not have the experience to do the job, and still we lost the business. That is how hungry they were for it even in 1940.

Q. Didn't you feel confident that this company, built upon a man of Northrop's reputation, that

(Testimony of Claude M. Monson.)

after it had completed its financing—I believe the facts are that its plant had been completed on January 15, 1940? A. That is right.

Q. Didn't you feel that Northrop's name and Northrop's reputation would create a certain amount of business for that company as soon as it could get in an operating position?

A. I did, yes, otherwise I never would have gone with them.

Q. I guess you will agree with me on this point, that as of March 4, 1940, the American aircraft industry was on the threshold of its most prosperous and expanding period in its entirely history, is that correct?

A. From hindsight I'm saying yes, from foresight I don't think we knew it.

Q. Mr. Monson, of course you do not want to represent to the Court here that a man of your experience in the aircraft industry, that on March 4, 1940, you did not anticipate and Mr. Northrop did not anticipate and this company did not expect to receive all the business that they could take care of just as soon as they got their plant completed and equipped [128] with personnel? You don't want to represent that to the Court, do you, Mr. Monson?

A. No, I would say that when we first organized the company we intended to get our share of what was in the field of operation.

Q. And you had high hopes and expectations of doing that at the time this corporation was organized, is that correct, Mr. Monson?

A. Well, if you will look at this book here you

(Testimony of Claude M. Monson.)

will find that we expected losses for the first two years.

Q. That would be anticipated with any new business wouldn't it, and particularly in the aircraft business, you would naturally expect in your initial development stage you would naturally expect to show losses, is that right?

A. We understood that we would have a two-year period in which we would have to develop a plane to be marketed and we would have to get a contract to produce that airplane before any profit could be anticipated.

Q. That was all in the initial development stage?

A. Yes, sir.

Q. As soon as you passed that stage you had no doubt of the ability of this company to hold its own with the others, Mr. Monson?

A. No, sir.

Q. Now, Mr. Monson, I want to ask you if you will identify [129] this booklet here for me.

A. It is the Northrop Aircraft Incorporated's 1940 Annual Report to the Stockholders.

Q. Does this booklet contain a statement as a sort of a preface to the balance sheet as of July 31, 1940?

A. Yes, sir.

Q. And it is dated October 10, 1940, is that right?

A. That is right.

Q. Does this show a comparison of unfilled orders and deliveries from August 1, 1939, to October 1, 1940?

A. Yes, sir.

Q. Does it show that as of October 1, 1940, the unfilled orders of this company had increased from zero on January 1, 1940, to \$20,617,586.14?

(Testimony of Claude M. Monson.)

Mr. Wall: If your Honor please, I object to that on the same ground upon which I noted an objection to portions of the stipulation, on the ground that it occurred subsequent to the valuation date.

The Court: That is of the same type to which you objected before?

Mr. Wall: That is right.

The Court: I will overrule the objection and let him answer.

The Witness: Yes, sir, it does.

By Mr. Maiden: [130]

Q. And this shows an analysis of unfilled orders, is that right? As of October 6, 1940?

A. Yes, sir.

Q. In other words, it breaks down this total figure of \$20,000,000 showing the customers from which the business was obtained, is that correct?

A. That is right.

Q. And this shows total United States Army orders of \$803,312.00, is that right? A. Yes, sir.

Q. And total United States orders of \$728,797.10, is that correct? A. Navy.

Q. That is Navy, United States Navy orders.

A. That is right.

Q. And military export of \$18,601,222.62. Will you explain what you mean by military export?

A. That is British, anything outside of the United States, and other foreign powers.

Q. And then you show a military export sub-contract, \$484,272.42.

A. That military sub-contract could be through and was through one of the local aircraft manufac-

(Testimony of Claude M. Monson.)

turing companies here which was doing work for Great Britain.

Mr. Maiden: For Great Britain, if the Court please [131] I would like to have this marked for identification as Respondent's Exhibit No. 1.

The Court: Do you want to offer it?

Mr. Maiden: Yes, sir, I do want to offer it.

Mr. Wall: Same objection, your Honor.

The Court: The objection is overruled. Admitted. It would not be No. 1. This would be Respondent's Exhibit BB.

(The document above-referred to was marked Respondent's Exhibit BB and received in evidence.)

By Mr. Maiden:

Q. Mr. Monson, will you identify this document as being the Second Annual Report of the Northrop Aircraft, Inc., for the fiscal year to July 31, 1941?

A. Yes, sir.

Mr. Maiden: If the Court please, to save time I would like to offer this in evidence as respondent's Exhibit CC.

Mr. Wall: Same objection, your Honor.

The Court: Overruled. Admitted.

(The document above-referred to was marked Respondent's Exhibit CC and received in evidence.)

By Mr. Maiden:

Q. Mr. Monson, wouldn't you say that this growth of Northrop from January 1, 1940, no orders to October 1, 1940, [132] of \$20,617,586.14 was a very phenomenal growth?

A. That was, yes.

(Testimony of Claude M. Monson.)

Q. Don't you think that growth was indicated by the circumstances and conditions existing in the latter part of 1939 and the first part of 1940?

A. It may have been in the middle of 1940, but I would not say in the latter part of 1939, my personal opinion.

Q. Now, I believe that Exhibit R to the stipulation shows that as of December, 1939, the Consolidated Aircraft Company had given a sub-contract to this company of some \$658,472.00.

A. That is right.

Q. That Consolidated Aircraft Company was one of the big old-line established aircraft companies in the United States at that time.

A. Yes, sir.

Q. Wouldn't you say that that was an expression on the part at that time of the Consolidated Aircraft Company of confidence and faith in this new company to successfully operate as an aircraft manufacturing plant?

A. Yes, sir.

Q. And your company so regarded that business, is that correct, as an expression of faith?

A. Yes, sir.

Q. You at no time, Mr. Monson, doubted the ability of [133] your company to produce and produce well if given the opportunity, is that right?

A. No, I haven't doubted that.

Q. Now Mr. Monson I believe you stated a moment ago, I don't know whether in answer to one of my questions or whether it was on direct examination, that you had sent a telegram, your company had sent a telegram to the United States Navy Department explaining to them just what you could do and the necessity for the Navy to expand its

(Testimony of Claude M. Monson.)

program, and so on, etc. I am just wondering, can you produce that telegram for us.

A. I don't know. I will look. It was a teletype. It was not—it was after we were supposed to have this order. Our competitors had come and said that we could not produce that we sent this long teletype showing the number of people we had, the years of experience of the individuals who were working at our plant. I shall try to find it, yes.

Q. Would you think that that telegram, or a copy of that teletype would have been kept right in the records of the company?

A. I should think so, yes.

Q. I would appreciate if that would be produced.

A. I will do so, yes.

Q. Mr. Monson, I will ask you if it is not a fact in this case that this company organized and commenced business [134] at about the most propitious time that it could have commenced business?

A. Commenced business, yes.

Q. And didn't you think that Mr. Northrop—I will just confine it to you—didn't you feel when you first came with Northrop that by reason of the war conditions and the demand for military aircraft, that this corporation was almost assured of successful operation, as soon as it could get its financing done, its plant built and started in actual operations?

A. I have always regarded Mr. Northrop very highly. In March, when they asked me to come, it was because I liked to be associated with him as I knew his ability, and I was confident that we would succeed.

(Testimony of Claude M. Monson.)

Q. So you did have high hope for the future of this company? A. Yes, sir.

Q. I believe you stated that on March 4, 1940, in addition possibly to the \$760,249.16 sub-contract with Consolidated Aircraft Corporation, that there was no other business on the books at that time, with the exception of that one contract?

A. That is the only contract that was on the books.

Q. Now, Mr. Monson, as best you can recollect, how much business was in the stage of negotiation at that time, [135] but had not been finally determined?

A. To my knowledge, the only thing that we had bid on was on a small bomber design contract for the United States Navy. Now, that was still in the bid stage. The bid had been submitted.

Q. The bid had been submitted?

A. Yes. Outside of that I know of nothing else. I don't mean to imply here that we were not always out trying to get business.

Q. You were, of course. A. Sure.

Q. I understand that. I am afraid, Mr. Monson, that I misunderstood this: did I understand you to say, and don't get mad at me if I have misinterpreted your statement, because I don't intend to, but do I understand you to say that on March 4, 1940, this company had no expectation or anticipation at that time of getting this great amount of business, or any part of it? Is that a reasonable interpretation of your testimony, or not a reasonable interpretation of it? [136]

A. Well, I believe that everyone has a reason-

(Testimony of Claude M. Monson.)

able expectation of getting their share of the business that is in the field.

Q. And you did have that reasonable expectation?

A. Why, certainly. I don't think we would have even started the company if we had not had.

Mr. Maiden: I believe that is all.

The Court: Any redirect?

Mr. Wall: Yes, your Honor.

Redirect Examination

By Mr. Wall:

Q. Mr. Monson, you just testified in response to Mr. Maiden's questions, I believe, that as of March 4, 1940, the only bid you had submitted on other business, aside from the Consolidated contract, was a little small Army bomber design. I believe you testified on direct examination that you had at that time submitted a bid to the Norwegian Government on that order, isn't that correct?

A. Oh, yes, I am sorry. We did have the other bid in.

Q. Now, Mr. Maiden has referred you to some figures and further down on Respondent's Exhibit BB, coming down to a total in excess of \$20,000,000.00 as of November 1, 1940. Isn't it a fact that that total of over \$20,000,000.00 worth of business is made up of the various orders which were listed on Exhibit R and which you testified to on your direct examination?

A. Yes, sir.

Q. And I think you testified specifically as to each of those orders, as to the circumstances surrounding them and the outlook toward them as of March 4, 1940.

A. Yes, sir.

(Testimony of Claude M. Monson.)

Q. Mr. Maiden has also called your attention to some of the language in the prospectus, Exhibit 1-A. I should like to refer you to the portion just below that which Mr. Maiden read on page 5:

“The business of manufacturing, of course, is subject to many special hazards and unpredictable conditions, and is speculative in nature. It is impossible to protect against many of the risks which are inherent to the business.”

Will you likewise subscribe to that statement from your knowledge of the aircraft industry?

A. Yes, sir.

Q. Isn't it a fact when you left your position at the Douglas Company and went into this new venture with Mr. Northrop and his other associates, that you had, as you have said, high hopes of success because of the people with whom you were associating yourself, because of the position he had always stood in the aircraft industry?

Mr. Maiden: Just a moment, if your Honor please. I object to that as being leading. [138]

The Court: It is rather leading, yes, I think it is.

Mr. Wall: Very well. I will withdraw the question.

By Mr. Wall:

Q. Your hopes for the success of the Northrop Aircraft Company, Mr. Monson, you have testified was based largely upon your high regard for Mr. Northrop. It is true, is it not, that you had had rather close contact with him during the years preceding 1939, when you agreed to go into this new company?

A. Yes, sir.

(Testimony of Claude M. Monson.)

Q. Hadn't you had closer contact with Mr. Northrop at that time than most people in the aircraft industry had had?

A. You mean outside of our own company?

Q. Yes.

A. That is pretty hard to answer, of course.

Q. You had worked in companies or divisions of Douglas Aircraft which Mr. Northrop was largely in charge of, isn't that so?

A. Yes.

Q. Now, at the time when you left Douglas and took this position with Northrop Aircraft, were your feelings of hope for the success of the Northrop Division shared by your [139] employers at Douglas?

A. No, sir.

Mr. Maiden: Just a moment, your Honor. I object to this witness testifying to what the feelings were with respect to some other people of some other company.

The Court: Unless he knows what they thought, I think he would not be qualified to testify to that.

Mr. Maiden: If your Honor please, I believe Mr. Monson got his answer in. I would like to have it stricken. I believe it is improper.

The Court: It may be stricken. I didn't realize he had answered.

By Mr. Wall:

Q. Did your former employers at Douglas make any statements to you concerning your leaving their employ and going to Northrop Aircraft Company?

A. Yes, sir.

Mr. Maiden: Your Honor, I object to that. That would be hearsay. I don't think it is proper evidence.

(Testimony of Claude M. Monson.)

The Court: I don't think we are concerned particularly with what some other corporation thought about this new company.

Mr. Wall: Very well.

The Court: You may strike that answer, also.
By Mr. Wall:

Q. Going back to the status of world affairs in 1939 and 1940, Mr. Monson, as I recall it Germany invaded Poland on about September 1, 1939, is that correct, according to your recollection?

A. Well, I know I was still at Douglas when the invasion happened, and it was a very hot spell, and it was September sometime, the first part of September.

Q. Do you recall after the invasion and collapse of Poland, that we went through a considerable period in which there was no very great activity of a military nature in Europe?

A. I probably was not up close enough to that end of it. I don't recall.

Q. As I recall, the invasion of Norway came in April of 1940. A. That is right.

Q. And the invasion of the Low Countries came in May of 1940, isn't that true?

A. That is correct.

Q. Isn't it a fact that the main upswing in demand for military aircraft, particularly in this country, followed chiefly after the invasion of the Low Countries?

Mr. Maiden: Wait just a moment. Your Honor,

(Testimony of Claude M. Monson.)

that is a leading question. I am awfully sorry. I hate to keep [141] making these objections, but——

The Court: I think you are rather aiding the witness by that statement.

Mr. Wall: Very well, your Honor.

The Court: I will sustain the objection.

By Mr. Wall:

Q. You testified on cross-examination, Mr. Monson, that the Consolidated order that was placed with you in December of 1939 was, you felt, based in part at least on the faith in the organization, in your company. Do you think that the fact that you bid for that order at an estimated no-profit price, as you testified, likewise had anything to do with that acceptance?

A. Of course, it did. We are all on a competitive basis.

Mr. Wall: I have no further questions, your Honor.

Recross-Examination

By Mr. Maiden:

Q. Mr. Monson, I believe under the Norwegian contract it was stipulated that the Norwegian Government was to advance a great portion of the total contract price to the company at the time the contract was let, is that your understanding?

A. That is right, sir.

Q. And that the balance of the amount called for in the contract would be and was placed in an irrevocable letter of [142] credit with a New York Bank, is that your understanding?

(Testimony of Claude M. Monson.)

A. That is right, sir.

Q. I will ask you if it is not true that under the types of contract that the aircraft industry was receiving in the latter part of 1939 and first part of 1940, and for that matter all during the rest of the war, for the manufacture and furnishing military aircraft to the United States Government and foreign governments, if it was not the custom that the purchaser would advance a substantial sum of the contract price to the producer, and then as the planes and parts had been delivered to them pay the balance of the contract price?

A. That is correct on foreign contracts and commercial contracts the usual advance is somewhere between 20 and 30 per cent, with the payment of the difference as each aircraft is delivered. With the United States Navy in those days, they had a base price bid, and the only reimbursement that you got from the Government was progression payments which were allowed for military contracts, based on the expenditures for actual material and labor, but which did not include engineering or other services, on which they would advance, so the result is on any contract the contractor almost can be sure, depending on the size of it, of being paid 50 to 60 per cent of the bid price before he gets anything out.

Q. So your answer is that in contracts you knew that [143] you would receive a certain percentage of the contract price in advance as working capital for the company in the production of that contract.

A. On foreign business usually, yes.

(Testimony of Claude M. Monson.)

Q. Mr. Monson, wouldn't the fact that the Consolidated Aircraft Corporation, which I believe you testified was one of the larger members of the aircraft industry in the United States, gave a sizeable subcontract to Northrop, which was a new corporation, in December, 1939, indicate that Consolidated had orders at that time beyond its capacity to produce?

A. Not necessarily. Subcontracting is being done today and has always been done. That does not mean you have not got time to produce them in your own organization, but you may not have the proper facilities or you may not have the floor space required.

Q. That would go to the capacity to produce, though, wouldn't it, those factors would go to the capacity to produce?

A. I would go further and say that there is not an aircraft company in the United States that produces 100 per cent of its airplane, even in the worst times.

Q. Even in the worst times?

A. That is right.

Q. Would you say, Mr. Monson, that in the latter part of 1939 and the first part of 1940 that the capacity of the [144] existing aircraft industry was not abreast of the then demand? Is that correct?

A. That is not correct. In the latter part of 1939 your aviation industry had room to take on orders, and thus the high competition that we ran into with the Navy, the Iraq Government and the Norwegian

(Testimony of Claude M. Monson.)

Government, when we had a chance to go after the business.

Q. In other words, that was an actual demand for military aircraft?

A. There was, small orders of 20 or 25.

Q. You felt that there was plenty of room for growth and expansion of the aircraft industry at that time, did you not, Mr. Monson?

A. We felt that, if I may reiterate again, we felt that there was room for a small aircraft company devoted to the design of military aircraft. We had no anticipation of going beyond the original plant site that we built and retaining the number of employees that we had agreed upon.

Q. But didn't you think that the potential demand and probabilities of future demand was so strong as to justify a belief in the aircraft industry as it existed in the United States in the latter part of 1939 needed to expand its capacity to take care of that probable future demand, which all the events of that time seemed to prophesy.

A. That is right. But my personal opinion is this, [145] when we first started the organization we thought that was what we were going to do, but we didn't know that we were going to go beyond that organization to the point where employees became numbers rather than individuals.

Mr. Maiden: I believe that is all.

Mr. Wall: May I ask the witness one more question?

The Court: All right.

(Testimony of Claude M. Monson.)

Redirect Examination

By Mr. Wall:

Q. Mr. Monson, were all of these orders which were on the company's books up to October 22, 1940, which are in the list attached to Exhibit R which you have looked at, were those the fixed price type of contracts?

A. Yes, sir, I am sure that they were.

Q. Exhibit R has a list attached thereto.

A. Yes, sir, they are all fixed price contracts.

Q. None of those were the cost plus a fixed fee type?

A. The cost plus fixed fee contract did not come into effect until 1941, if my memory serves me correctly.

Recross-Examination

By Mr. Maiden:

Q. Your contracts with the British Government were on very liberal terms, weren't they, liberal returns?

A. As to the terms of the contract?

Q. Yes. [146]

A. We produced the Spaulding Airplane for them.

Q. I say they were quite liberal returns that allowed you a nice margin of profit for the company?

A. We did anticipate a nice margin of profit, yes, sir.

Q. As a matter of fact as certainly as of October 10, 1940, you anticipated and expected to make

(Testimony of Claude M. Monson.)

on the orders you had a profit of in excess of \$4,000,000.00 by the end of that year, didn't you, Mr. Monson?

A. Yes, but may I go further and say that was covered——

Q. He did explain that. A. He did.

Q. I believe your orders had reached a high of some \$70,000,000.00 up to July 31, 1941, isn't that correct, Mr. Monson?

A. I wouldn't remember the exact date. You said 1941. It is one of the reports.

Q. In excess of \$70,000,000.00, is that right?

A. That is right.

Mr. Maiden: I believe that is all, your Honor.

Mr. Wall: No further questions.

The Court: That is all, Mr. Monson. We will adjourn until 2:00 o'clock.

(Witness excused.)

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.) [147]

Afternoon Session, 2:00 p.m.

The Court: Call your witness.

Mr. Wall: Mr. Carl L. Barnes.

Whereupon,

CARL L. BARNES

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, and your address, please.

(Testimony of Carl L. Barnes.)

The Witness: Carl L. Barnes, 639 South Spring. That is my business address. Do you want the home address, too?

The Clerk: That is not necessary. You may be seated.

Direct Examination

By Mr. Wall:

Q. Mr. Barnes, what is your business or occupation? A. Investment securities.

Q. Are you employed by or a member of an investment securities firm at the present time?

A. Yes, I am a member of the Los Angeles Stock Exchange and I am employed by Morgan & Co.

Q. Were you in the securities business in the latter half of 1939? [148] A. I was.

Q. At that time were you associated with the securities firm of White, Wyatt & Co.?

A. Correct.

Q. In Los Angeles? A. Yes.

Q. What was your position in that firm then at that time?

A. I was manager of the stock department.

Q. Were you familiar with a transaction whereby Mr. T. T. Ellsworth in the latter part of 1939 exchanged his rights under a certain contract with Northrop Aircraft Company for certain shares of Duvall Texas Sulphur Company which were formerly owned by Mr. A. H. Smith of Houston, Texas? A. I am.

Q. Did you take part in that transaction?

A. I did.

(Testimony of Carl L. Barnes.)

Q. In what way did you participate in the transaction, Mr. Barnes?

A. I was the party that brought the two together.

Q. How did you first become interested or involved in the transaction?

A. Well, I heard of this management contract that Ellsworth had for sale and contacted him with the idea that I might be able to dispose of it. [149]

Q. Can you state approximately when you first heard of that?

A. I would say during the latter part of August or the first part of September, 1939.

Q. And after you contacted Ellsworth and said that you might be able to dispose of it, what did you do then?

A. I contacted a friend of mine by the name of Smith with the idea of trying to get him to buy it.

Q. Is that Mr. A. H. Smith of Houston, Texas?

A. Mr. A. H. Smith, yes.

Q. Had you previously met Mr. Smith?

A. Yes, I had.

Q. Did you have any reason to believe at that time that Mr. Smith might be interested in such a contract?

A. Yes, I did. I had known Mr. Smith for several years, and from time to time he became interested in aviation securities and particularly ones in Southern California.

Q. Had he made statements to you to the effect that he was interested in that type of security?

(Testimony of Carl L. Barnes.)

A. Yes, he did.

Q. What was Mr. Smith's initial reaction to your proposal, Mr. Barnes?

A. Well, he was very much interested in the newly formed corporation of Northrop and Company, and when I indicated to him that I might be able to pick up a management [150] contract, he showed a good deal of interest.

Q. Did he make any statements to you during your contacts with him concerning his reasons for buying any such contract, besides the one you have already mentioned?

A. Yes, he did. He was very much interested in Jack Northrop himself.

Q. I see. Do you know whether he was personally acquainted at that time with Mr. Northrop?

A. I don't believe so.

Q. Can you state approximately how long the negotiations looking toward this transaction continued?

A. I would say approximately 90 days.

Q. And in general of what did the negotiations consist?

A. Bartering back and forth as to price.

Q. Was Mr. Smith in Texas during the entire period of negotiations?

A. Not the entire period. He was here when the negotiations started, and when they were finished he was in Texas.

Q. Some of the negotiations were personal and

(Testimony of Carl L. Barnes.)

others were carried on by correspondence, is that correct?

A. Oh, yes. As a matter of fact there was a good deal of correspondence, telephone calls, telegrams, et cetera, that lasted over a period of several months.

Mr. Wall: That is all. [151]

Cross-Examination

By Mr. Maiden:

Q. Mr. Barnes, do you know why Ellsworth was interested in selling his Northrop contract?

A. Why, I would answer that in the following way: I believe Ellsworth wanted to raise some money.

Q. It is a fact, isn't it, that Mr. Ellsworth at that time was in very strained financial condition, or under the compulsion of raising some cash money?

A. I don't know that.

Q. Did he tell you that?

A. No, he did not.

Q. But you did understand that he wanted to raise some cash money and that is the reason why he was interested in selling his Northrop contract?

A. That is right.

Q. Do you know whether Mr. Smith is living or dead now?

A. He is dead.

Q. Mr. Barnes, what was the price at which the parties determined—strike that. What price did the parties determine that the Duvall Texas stock was worth at the time of the exchange?

A. Approximately \$7.00 a share.

Q. Would you say that that represented a fair

(Testimony of Carl L. Barnes.)

market [152] value at that time of the Texas Duvall stock, \$7.00 a share?

Mr. Wall: If your Honor please, I object to that as calling for a conclusion of the witness. I have not qualified Mr. Barnes as an expert. I have no objection to Mr. Maiden's calling him as his own witness for that purpose, but I do not think it is proper cross-examination.

Mr. Maiden: If your Honor please, he has answered the question——

The Court: I don't know. He has not been qualified. He said he is in the securities business, and that is hardly enough to qualify a man without more, I think.

By Mr. Maiden:

Q. Mr. Barnes, I will ask you if it is not a fact that Mr. Smith, when this \$7.00 figure was arrived at as the value of the Texas Duvall stock, if Mr. Smith did not give Mr. Ellsworth a guarantee that that would be and that that was the fair market value of the Texas Duvall stock?

A. Well, there was no guarantees of any kind given.

Q. What was your understanding in that respect, Mr. Barnes?

A. In regard to the amount of money involved or——

Q. In regard to Mr. Smith assuring Mr. Ellsworth that that \$7.00 represented the fair market value of the Texas Duvall stock, and that the Texas Duvall stock would be worth \$7.00 a share. [153]

(Testimony of Carl L. Barnes.)

A. Your question is not exactly clear. However, as far as price, the last sales were a matter of record at that time.

Q. Was it on the basis of those last sales that you arrived at the \$7.00?

A. Yes, it was. Duvall Texas Sulphur is listed on the New York Curb, and transactions occur almost daily, but not always.

Mr. Maiden: I believe that is all, your Honor.

The Court: Is that all, Mr. Wall?

Mr. Wall: May I ask one question, your Honor?

The Court: Yes.

Redirect Examination

By Mr. Wall:

Q. Mr. Barnes, you testified that you understood that Mr. Ellsworth wanted to raise money. Did Mr. Ellsworth make any statements to you concerning that matter prior to or during the negotiations leading up to this exchange?

A. Well, anyone that wants to dispose of a contract of that type, I immediately assume that he wanted to raise money for some purpose.

Q. Did he make any statement to you concerning his need for money? A. No, he didn't.

Mr. Wall: That is all, your Honor. [154]

* * * *

Mr. Wall: If Your Honor please, I very greatly appreciate the indulgence of Court and counsel. The witness is now here and I will call Mr. B. P. Lester. [155]

Whereupon,

B. P. LESTER

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: B. P. Lester, 621 South Spring Street, Los Angeles, California.

Direct Examination

By Mr. Wall:

Q. What is your business or occupation, Mr. Lester?

A. I am the president of Lester & Company, registered security dealer, engaged in the underwriting and distribution of corporate and municipal securities.

Q. How long have you been engaged in the securities business, Mr. Lester?

A. Between 24 and 25 years.

Q. Your firm of Lester & Company was one of the underwriters of the Class A Common stock of Northrop Aircraft, Inc., which was offered to the public in 1939, was it not? A. It was.

Q. Was your firm of Lester & Company one of the original group of underwriters who considered underwriting that stock?

A. No, it was not one of the original group. [156]

Q. Do you recall approximately when Lester & Company became a member of that group?

A. Well, I think it was the end of May or the first part of June, 1939.

Q. What were the circumstances under which

(Testimony of B. P. Lester.)

Lester & Company came into the group of underwriters at that time?

A. I believe the original group included two other security dealers who when the registration statement was filed just before the issue was to be granted decided not to undertake the distribution of the securities. E. H. Rollins & Sons and O'Melveny, Waggenseller & Durst were the two firms that had withdrawn. I was approached by an officer of Banks, Huntley & Company, I think it was late in May, 1921.

Q. 1939? A. May, 1939. [157]

Q. Now, Mr. Lester, it is in evidence here that the original underwriting agreement, which was dated June 17, 1939, provided for the purchase and distribution, on an underwritten basis, by the underwriters, of 200,000 shares of Northrop Class A Common Stock, also for the appointment of the underwriters as the exclusive agents of the company, for the sale of an additional 200,000 shares on an agency basis. You recall that, do you?

A. That is my recollection, yes.

Q. It is further in evidence that that underwriting agreement was amended under date of August 13, 1939, to cut down the number of agency shares, from 200,000 to 50,000. Do you recall that?

A. That is correct.

Q. Will you please state the circumstances, under which the total amount of stock to be distributed, was thus reduced from 400,000 to 250,000 shares?

(Testimony of B. P. Lester.)

A. Well, there were six underwriters, as I recall it, the Banks, Huntley Company and ourselves, O'Brien, Potter & Co. of Buffalo, Cohu, Torre & Jorgenson of New York, Air Investors, which was an investment trust, with a portfolio of aircraft securities, and as I recall it, Hartley, Rogers & Co. After the registration statement became effective, we attempted to distribute the stock. It went very badly to begin with, and negotiation was undertaken with Mr. Floyd [158] Odum, President of the Atlas Corporation, which resulted in a subscription by the Atlas Corporation, for, I think it was 30,000 shares of stock, and the number of warrants, 6,000 public warrants, that were offered with those shares, and we underwriters gave up to Atlas Corporation, our proportion of underwriters' warrants that related to the shares to be sold, and which we were to receive as part compensation, plus some additional ones that related to other shares, that is, underwriters' warrants. That gave the offering of the stock sufficient appeal so that we were able to continue the selling, but when we had gotten to about 200,000 or 225,000 shares, it was obvious that it would be perhaps not impossible, but very difficult to go beyond, distribute beyond the 250,000 shares, because we were getting re-purchases almost as fast as we were getting sales, and we negotiated with the officers of the company, and the promoters of the enterprise, to have a revision of their initial program. Their initial program called for the expenditure of about \$2,000,000, and it was felt that that

(Testimony of B. P. Lester.)

amount of money was the smallest amount that they felt would make them readily competitive, but that they could review their whole program and start in on a smaller scale with the amount of capital which could be raised, by the sale of 250,000 shares, that was \$1,250,000 in the company, and that was accomplished, and the offering was cut down from 400,000 [159] to 250,000 for those reasons.

Q. Mr. Lester, you mentioned this Atlas Corporation purchase of 30,000 shares. Did the Atlas Corporation buy those shares from the underwriters?

A. Well, I don't recall the exact way that worked out, except that Atlas was willing to purchase the shares, provided they got the securities, and it would not become an underwriter. Now, I don't know whether they purchased on that——

Q. I show you Exhibit No. 1A, page 15, where it is said that Atlas Corporation has purchased from the underwriters, 6,000 underwriters' units.

A. That is correct.

Q. That would comprise 30,000 shares and 6,000 warrants, is that not correct?

A. That is correct.

Q. What was the price that Atlas Corporation paid for those?

A. Well, they paid, as I recall it, the net price to the company, which was \$5.00 a share.

Q. And they paid that to the underwriter; was that the same price that you had to pay the company for those shares?

A. That is correct.

(Testimony of B. P. Lester.)

Q. The price at which the underwriters offered the [160] shares to the public, however, I believe it is in evidence here, \$6.00 for each share, is that not true? A. That is correct.

Q. Did your firm of Lester & Company deal in Class A common shares of the Northrop Company, during the period from July 31, 1939, to December 31, 1940, Mr. Lester? A. We did.

Q. Were you a director of Northrop Aircraft, Inc., during this period of distribution of the Common Class A to the public?

A. Yes, I was a director until, I think, 1942 or 1943. I think it was 1942 when I resigned.

Q. When did you first become a director?

A. At the inception of the company.

Q. As a director of the corporation, Mr. Lester, were you generally familiar with its business affairs? A. I was.

Q. And, with its financial condition and structure? A. I was.

Q. And, with its plans for future activities?

A. I was.

Q. Its prospects for future business?

A. I was.

Q. Now, do your activities in the securities business, Mr. Lester, involve the determination of the value of [161] securities of various types?

A. Yes.

Q. Does that include stocks as well as bonds?

A. That is correct.

(Testimony of B. P. Lester.)

Q. Does your experience in that connection include the valuation of aircraft securities?

A. Yes, it does.

Q. Securities of new enterprises?

A. That is right.

Q. Would you tell us in what way those activities, in your opinion, involve valuation of securities.

A. Well, for the past 24 years I have been in the underwriting end of the securities business. It is an essential part of our work that we arrive at the dollar valuation of the securities, in connection with our purchases of securities all the time. [162]

Q. Do your activities involve the valuation also in dealing with securities for your own account and for the account of your firm?

A. That is correct.

Q. Your activities involve that type of valuation in advising clients as to investments?

A. It does.

Q. Would you please give me briefly, Mr. Lester, the elements of valuation which you customarily consider important in valuing a common stock.

A. Well, I would say the assets of the corporation, the earnings, the management and its experience, background, the history of the enterprise, the nature of the business, of the field in which the company is to be engaged or is engaged. There are a good many others. I think those are the principal ones.

Q. I think that is sufficient, Mr. Lester. Were you familiar with the arrangements which were

(Testimony of B. P. Lester.)

made in June of 1939 for the issuance of certain Class A and Class B shares to the promoters of the Northrop Aircraft, Inc., namely, Mr. Cohu, Mr. Northrop, Mr. Irving, Mr. Bellande, Mr. Stephens and Mr. Ellsworth? A. I am.

Q. Have you made a study of the facts in this case, as set forth in the stipulation which is filed herein and in the [163] exhibits attached thereto?

A. I have read the stipulation and exhibits, yes.

Q. Have you read the Articles of Incorporation of the Northrop Aircraft, Inc.? A. I have.

Q. And particularly that provision of Article 5 relating to the restrictions of the Class B shares?

A. Yes.

Q. Have you read the contracts dated June 17, 1939, between the company and Messrs. Cohu, Northrop, Irving, Bellande, Stephens, particularly relating to the issuance of Class A and B shares to these promoters?

A. And the amendment to the contract. Is that the contract which was amended at a later time?

Q. I think you are thinking of the underwriting agreement. A. That is correct.

Q. That is, for the sale. A. That is correct.

Q. I am speaking of the agreement between the company and each of the various promoters.

A. I have, yes.

Q. Have you read the Corporation Commissioner's permit relating to issuance of the Northrop stock? A. I have. [164]

Q. Which is set forth in the prospectus attached

(Testimony of B. P. Lester.)

as an exhibit to the stipulation? A. I have.

Q. And have you noted conditions B, C and D in that permit relating to restrictions on the shares to be issued to the promoters? A. Yes, I have.

Q. Are you familiar with or have you read the agreement between the company and the promoters dated as of November 30, 1939, whereby the promoters waive their rights to dividends and waive their rights to participate in assets, pursuant to the Corporation Commissioner's permit?

A. I have.

Q. Were you present in the court room during the testimony of Mr. Claude M. Monson with respect to the business conditions and prospects of the company as of March 4, 1940? A. Yes, I was.

Q. Have you reviewed the balance sheet of the company as of February 29, 1940, attached to the stipulation as Exhibit 18-S? A. I have.

Q. Are you familiar with the information set forth in the stipulation in Paragraphs 41 and 43?

A. I am.

Q. Are you familiar with the information which is set [165] forth in Exhibit 19-T of the stipulation regarding the number of unrestricted or public Class A common shares which were purchased and sold by your firm of Lester & Company during the period from November 9, 1939, to March 8, 1940, and the prices at which those shares were purchased and sold? A. I am.

Q. Now, Mr. Lester, for the purpose of answering the question which I am about to put to you, I

(Testimony of B. P. Lester.)

would like to give you the following definition of the term fair market value: By the term fair market value is meant the fair value of property in money as between one who wishes to purchase and one who wishes to sell, that is, the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price will trade, neither being under any compulsion to trade, and both having a reasonable knowledge of the facts. I caution you that the prices at which stock is sold on an over-the-counter market or stock exchange are not necessarily controlling in fixing the fair market value of the stock, although such prices are a factor that should be considered with other factors. I caution you also that sales made under peculiar and unusual circumstances, such as sales of small amounts or sales in a restricted market, are not necessarily controlling in fixing the fair market value. In formulating your opinion and in answering the question which I am about to put to you, I will ask you to put yourself back at March [166] 4, 1940, disregarding facts occurring after that time and limiting yourself to the facts which were known on or before that date or which could have been reasonably anticipated. Now, Mr. Lester, what, in your opinion, was the fair market value on March 4, 1940, of the Class A common shares of Northrop Aircraft, Inc., which were issued to Mr. Northrop, Mr. Cohu, Mr. Irving, Mr. Bellande and Mr. Stephens, as promoters of that corporation?

A. I do not think they had any value.

(Testimony of B. P. Lester.)

Q. What, in your opinion, Mr. Lester, was the value on March 4, 1940, of the Class B common shares of Northrop Aircraft, Inc., which were issued to the same gentlemen as promoters of Northrop Aircraft, Inc.?

A. I do not think they had any value.

Q. Will you please state the reasons on which you base the opinions which you have just expressed?

A. Well, I think the two principal reasons are these: The restrictions under which these shares were issued, coupled with the fact that the five men who received the shares were the basis upon which this whole promotion was being made. Mr. Northrop, Mr. Cohu, Mr. Irving, Mr. Bellande and Mr. Stephens were all men with unusual experience in the aircraft industry. Northrop was an engineer of experience and very high standing in the industry, who contributed many very unusual technological advancements to the industry, both [167] in the design of the airplane itself and also in the structural design of the aircraft components. I think he is responsible for the so-called monocoque construction of the wing, which braces the entire wing from the inside, eliminating what we used to call struts in the old airplanes, making a very clean design. Along with that fact he was the designer who had developed a great many of the very advanced models for the aircraft as well as certain parts of their planes. Mr. Cohu had a rather long business experience in aircraft. As I recall it, he had been president of

(Testimony of B. P. Lester.)

North American Aviation, a company which was one of the earliest in the field of aviation, he was a director of T.W.A., and the organizer and one of the directors of Air Investors, Incorporated, with a wide business experience in aircraft manufacturing and aircraft operation. The other three men were experienced in aircraft. Mr. Irving had had a very considerable shop experience in connection with shop practices in aircraft manufacturing and was a graduate of a technical school, and his value was very great, because of his experience in shop practice and techniques in aircraft manufacturing. The other two men were two of the most experienced fliers in the country. Mr. Bellande had, I think, more hours than any other transport pilot in 1939, was one of the holders of the Congressional Air Mail Medal and really was an experienced pilot both from the standpoint of operation of aircraft [168] generally and in aircraft care in operation. He was considered to be an ideal prospect for this pilot duty. Stephens had had a wide experience in aeronautics. He was a pilot who had flown with Richard Halderman around the world and was well known as a pilot, and he was one of the type of people who lent the prospect of stability to this enterprise. I listened to Mr. Monson's testimony this morning with reference to the experience in making that aircraft and I recall a good many of the things that he mentioned. So I think we felt that with a group of that kind and the peculiar experiences of that group and with that group tied in there was a very

(Testimony of B. P. Lester.)

substantial financial prospect for the success of the company, that it was a proper thing to offer the public the securities in the enterprise. It is that particular group, in my opinion, which was responsible for the marketing of the securities. With that group we were able to sell the stock at the offering price and sell it rapidly enough to distribute more stock than we required for the market. But it is my opinion that if any one of these gentlemen had attempted to market his securities, that that fact alone would have completely dissipated public interest in the shares, not only of the public holding but in the shares that he would be selling. I can't conceive how the informed investor would have paid anything for the stock of those men. He might that somebody would pay the market value of the stock, but if one [169] of those gentlemen sold out, in my opinion, it would dissipate the entire enterprise, especially if it had been understood by the public that we were offering this Northrop stock. That is all there was that the company was offering for sale. The company did not have anything except a batch of papers, and in 1940 the company was a little worse off, in my opinion, than it was when it was started. They had used more money than they planned in this plant, and that is demonstrated by the balance sheet of July 19, 1940. They put it in promotional expense and in plant, and if any work had been offered to them that did not result in their getting advance payments or other help of that kind, it would have been difficult for me to see how

(Testimony of B. P. Lester.)

they could have taken the work. The financial crisis for the company came about two months later.

Q. Two months later than what?

A. Than March, the early part of March.

Q. March 4th?

A. It came the early part of May, as I recall it, when the company started up its work. It had invested its capital in fixed assets, and found itself without working capital to meet a payroll, and without a credit. It required considerable negotiation, as I recall it, in the early part of May, to establish a credit line with the Bank of America and the Security-First National Bank of a sufficient amount [170] of money to carry them over that crisis. Fortunately by that time they had acquired the Norwegian contract, which was the backlog of business which made such bank financing possible.

Q. May I ask you there, Mr. Lester, you mentioned this crisis which occurred about two months after the early part of March. In your opinion, was that crisis foreseeable and in the making on March 4th or not? I ask you that because your opinion must be based on the factors that were known or could reasonably be foreseen.

A. Well, I thought it was very evidently a future possibility.

Q. Your own personal opinion at that time was that the crisis——

A. My personal opinion was that the program that the company was engaged in was greater than

(Testimony of B. P. Lester.)

the amount of capital started with could adequately service, and that there was some danger ahead.

Q. Did you consider other factors in arriving at the opinion you have expressed, Mr. Lester?

A. Well, there are all these factors, the fact that the stock was in this escrow and that the corporation Commissioner's permit—under that there was the disabilities with reference to earnings and dividends, and in the event the company had failed no recapturing of any part of the assets, that is, it [171] all had to go to the public stockholders.

Q. Did you give consideration to the earnings history of the company at that time?

A. Well, it didn't have any.

Q. Did you give consideration also to the order position of the company at that time, the amount of orders that it had on its books then?

A. Yes, I did.

Q. Did you give any consideration in arriving at your opinion, Mr. Lester, to the size of the stockholders involved, the fact that, according to the stipulation Mr. Northrop had 15,384 Class A shares and 38,461 Class B shares, Mr. Cohu had seventy-six hundred odd A shares and eleven thousand five hundred odd B shares; that Mr. Irving had forty-six hundred odd A shares and ten thousand seven hundred odd B shares; and the fact that Messrs. Bellande and Stephens had fifteen hundred some A shares and twenty-three hundred some B shares?

A. Well, those were a great deal larger blocks than were being traded in on the market. Even if

(Testimony of B. P. Lester.)

they had been free from restrictions and the market was not aware of the fact that principal officers of the company were selling it, those were very much larger blocks than would have brought anything like the market price for the number of shares traded in the early part of March. [172]

Q. You have stated that, in your opinion, neither the Class A nor the Class B shares issued to those men had any fair market value. Are there any different reasons applicable to the Class A shares that are not applicable to the Class B, or vice versa, in your opinion, Mr. Lester?

A. No. I felt and I am sure that every other underwriter felt that we had an unqualified obligation for those men to stay with the enterprise.

Q. There was an unqualified obligation on those men?

A. Absolutely. We were making two markets for one on the strength of their living up to their obligation.

Q. In arriving at these opinions as to value which you have expressed, Mr. Lester, did you give consideration to the transaction which is described in the stipulation in Paragraphs 52 to 60, inclusive, in which Mr. T. T. Ellsworth in November, 1939, exchanged his contract or his contract rights under his agreement with the company for 2200 shares of Duvall Texas Sulphur Company owned by Mr. A. H. Smith of Houston, Texas?

A. I am familiar with that transaction.

Q. What weight, if any, did you give to that

(Testimony of B. P. Lester.)

transaction in formulating your opinion as to the value of the stock?

A. Well, so far as Ellsworth was concerned, it was entirely different for him to have dropped out of the [173] enterprise. He was a bond salesman employed by Banks, Huntley & Company who had acted as a go-between between those groups and had done some work in connection with the proposed plant location, and it was not contemplated that he even had any interest in the company at all, and as I recall it, he had no official position with the company.

Q. Did Mr. Ellsworth have any background in the aircraft industry at that time?

A. I don't think he had up to that time had any experience. In relation to his contract, which took this first stock out in November, 1939, I will be very frank to state, from expressions I have heard, he never had to pay anything for that contract.

Q. In arriving at the opinions which you have expressed, Mr. Lester, did you give consideration to the prospects as of March 4, 1940, for future earnings of the company, as you saw them?

A. Yes, I think I did.

Q. And in arriving at your opinion with respect to the Class B shares, did you give consideration to the option in the company to repurchase certain of the shares of Mr. Northrop, Mr. Cohu and Mr. Irving, under certain conditions?

A. I did, yes.

Q. For 25 cents a share?

A. I did. [174]

(Testimony of B. P. Lester.)

Q. In connection with the B shares, did you give consideration to the restrictions of those shares under the Articles of Incorporation, as well as the restrictions imposed by the Corporation Commissioner's permit on both the A and B shares?

A. I did.

Mr. Wall: I have no further questions.

The Court: Cross-examine.

Cross-Examination

By Mr. Maiden:

Q. Mr. Lester, you mentioned the Atlas Corporation as having taken over a certain block of these shares from the underwriters in 1939. What was the nature of the business of the Atlas Corporation?

A. It is an investment trust. The head offices were then, I think, Jersey City, New Jersey.

Q. Is that a large concern?

A. Yes, it is one of the largest investment trusts in the country, I believe.

Q. And is it your understanding that the Atlas Corporation in taking over this block of stock did so for investment purposes, and not for resale to the public? A. That is correct, yes.

Q. Now, is it true, Mr. Lester, that at the time the underwriting agreement was amended so as to reduce the number [175] of shares to be taken down by the underwriters, that at that time the underwriters made firm their undertaking with respect to the reduced number of shares?

(Testimony of B. P. Lester.)

A. As I recall it, yes, they went firm on the 250,000.

Q. Prior to that time you could have gotten out of the undertaking, depending upon conditions?

A. That is correct, yes.

Q. Now, Mr. Lester, do you profess to be a man of experience and knowledge of the aircraft industry?

A. Well, with reference to financing of the aircraft industry, I have participated, I think, or my firm has at my suggestion in the securities of almost all the aircraft companies except Douglas. We were in the original and in the two subsequent pieces of financing by Lockheed. We were in the Martin financing. We were in the Consolidated financing. We were in the Vultee financing. We were in the Grumman financing. We participated in the distribution of both Brewster and Bell-Aircraft, and also in a good many of the airline stocks we participated.

Q. But aside from that phase, though, you do not profess to have any experience in the operation of aircraft manufacturing plants?

A. Yes. I was vice-president in charge of financing of Aurora Aircraft Corporation for three years during the war. That was the largest subcontract— [176]

Q. What war was that?

A. This past war.

Q. I am speaking now as of 1939 and March 4, 1940.

(Testimony of B. P. Lester.)

A. No, I had never had any experience with aircraft companies prior to the war, this present war.

Q. Either in financing or otherwise?

A. Oh, yes. I had experience in financing.

Q. In finance?

A. Yes. I went back over that this noon. We were in the Lockheed financing, as I say, two pieces of financing for Lockheed, one, I think, was three years before 1939, came in 1936, I believe, and one in 1938. The Bell financing, Bell Aircraft came before this and Martin came before this. Consolidated came before it. We were one of the underwriters of the Grumman stock, and handled the distribution through some 14 or 15 dealers on the Pacific Coast, and that was in 1938, I believe, 1937 or 1938. We were in the Vultee convertible and preferred financing. All of those came before Northrop. The only one that came after was the distribution of Aurora Aircraft stock.

Q. Mr. Lester, what, if you know, was the trend in the aircraft industry in the United States on March 4, 1940? Was it upward or downward?

A. You mean the trend in the——

Q. In the business. [177]

A. ——volume of business and so on?

Q. Yes, sir.

A. I think it was a forward trend.

Q. You think it was a forward trend?

A. Yes.

(Testimony of B. P. Lester.)

Q. Would you say that that trend commenced as early as the latter part of 1938?

A. I think the trend commenced before that. Certainly for the major plants it commenced substantially before that. Lockheed had gotten over the hump in 1935. The purchasing commissions of the French and British had commenced to arrive, I think, it was in 1938, in the summer of 1938. I think there was a forward trend in the industry that began when it recovered from the 1929 depression, began in through 1932, '33, and '34 and carried all through that period.

Q. Would you say that the aircraft industry, or did you so regard it, as being a permanent and necessary part, leaving aside the idea of a war breaking out, of American industry and commerce?

A. You mean in 1940?

Q. In 1937, 1938 and so forth.

A. It certainly was a definitely established industry in America.

Q. And it was an industry that was growing and expanding? [178]

A. It was.

Q. Would you say, Mr. Lester, that the Northrop Aircraft Company was organized at a strategic time, so to speak, from the standpoint of being able to expand and operate profitably and at the most propitious moment in the history of American aircraft?

A. No, it was too late. It should have been five years earlier.

Q. It should have been five years earlier?

(Testimony of B. P. Lester.)

A. The major companies were established in fields in the industry considerably before 1939, and, in my opinion, the danger that Northrop had was the kind of competition that it got from the companies that had already carved out a slice of the business for themselves, like the Douglasses and the Martins.

Q. Mr. Lester, what interested you in becoming an underwriter of this company in the early part of 1939? A. What interested me?

Q. Yes.

A. I thought we were going to have a war and I thought we were going to have a larger volume of aircraft business in this country than we had ever seen before.

Q. Did that turn out to be true?

A. Oh, yes, no question about it. And I thought that with the capacity of Northrop and his group of people, that [179] they would get a share of that business.

Q. Did that turn out to be true?

A. It did.

Q. And did it surpass your expectation?

A. No, it did not.

Q. Would you say then, Mr. Lester, that in the latter part of 1938 and first part of 1940—the latter part of 1939 and first part of 1940, would you say that the prospects for the successful and profitable operation of this business were good?

A. Yes, they were good, in my opinion.

Q. Would you say that they were better in

(Testimony of B. P. Lester.)

view of the national situation than they would have been in ordinary peace times?

A. I think so, without question.

Q. Did you consider, Mr. Lester, that the obtaining by the Northrop Company of the subcontract from Consolidated Aircraft and obtaining the Norwegian contract had the effect of really establishing Northrop in the business?

A. Well, those were the first two pieces of business that the company had been able to attract up to that time. It is a little hard for me to tell what you mean by establish. At that particular time, in that particular period, there was rather wide expansion, there was considerable experience about aircraft and the placing of contracts. There was a very [180] small amount of actual work placed. I imagine it was attributable to the fact that the planning had not taken form yet.

Q. But this big competitive business was there?

A. It was still out in front.

Q. And it turned out better than you really expected it to turn out, didn't it? It turned out all right?

A. Well, I think Northrop got its share when the thing came along. I think the disappointing fact was that it did not come along a little sooner.

Q. You mean that the money did not come along a little sooner?

A. Yes, I think Northrop could have handled that volume of work sooner than it did.

Q. So that you would say then that on March

(Testimony of B. P. Lester.)

4, 1940, that the anticipation of the rapid growth of Northrop on an eventually profitable basis was high and based upon sound reasoning?

A. Well, I hadn't lost my faith in myself in the effectiveness of that team.

Q. In other words, you put great value yourself in Northrop at that time and in an investment of Northrop at that time?

A. That is right. We had sold the stock, and there was still steady buying of it all during that period of time. [181] We sold the stock was there wasn't any Northrop, there was just a bunch of papers, and we sold it on the ability of those five men, and even though their planning was a little heavier than their penny box during that earlier stage, I don't think—I know I didn't and I don't think the other underwriters lost faith in their ability, that group, to get its share of the business and do it for a profit.

Q. In other words, you felt that this team would attract business in the aircraft industry, under the demand conditions of that time, like honey would attract flies, so to speak?

A. We expected to attract business, all right.

Q. And they did attract business?

A. It did.

Q. And most substantial business?

A. It did.

Q. Mr. Lester, did your company retain any of the shares in Northrop?

A. For permanent investment of the firm?

(Testimony of B. P. Lester.)

Q. Yes.

A. No, I don't think so, but trading in the shares actively, there were times when we were long a substantial amount of shares. We would be long a substantial number of shares from time to time, and then that position would [182] reduce. It is not our business. We are not an investment trust. We are a merchandiser of securities.

Q. I was just asking you individually. Did you purchase any Northrop stock?

A. As I recall it, I owned some stock at some period of time in there, not in a large amounts, however. We had an interest in it because of the ownership of underwriters' warrants under the underwriting. If the company was successful over a period of time those warrants would have been valuable to us. As it turned out they were not valuable, and we never received anything from them at all.

Q. Did you company sell some of these warrants in the latter part of 1939 and during the year 1940?

A. No, we traded in the warrants on a brokerage basis. Each one of the underwriters owned a block of underwriters' warrants, and the other underwriters wanted to register and distribute their warrants. I did not feel that we should recommend to our customers the purchase of the warrants, and we refused to participate in the registration of the warrants and offering them to customers. All of the other underwriters except Lester & Com-

(Testimony of B. P. Lester.)

pany registered their warrants for distribution. We didn't because I didn't feel it was the proper thing to sell them, and we traded them on a brokerage basis entirely, anybody would give us an order.

Q. But the other underwriters, though, registered them [183] and did sell them?

A. I don't think they sold very many of them. My mind is not very clear on just what happened at that time, but they registered them and I think they started to sell the warrants, and then I think there was a changed condition in connection with the company, which I do not recall very clearly, and they withdrew the offer. Now, I don't know how much any one of them sold. I didn't sell any.

Q. I am just wondering if this might refresh your recollection on it, Mr. Lester. I have here an offering of outstanding underwriters' warrants for the purchase of 21,571 shares of Class A common stock, par value \$1.00 per share.

A. That is right.

Q. The units are being offered to the public by the following respective underwriters at \$3.75 per warrant; it mentions then Banks Huntley, O'Brien, Potter & Company, Cohu Brothers, Jorgenson, Hartley Richards, and Air Investors, Incorporated. Is that what you had reference to?

A. That is correct. We didn't register our units, had no intention of distributing to the public.

(Testimony of B. P. Lester.)

Q. I will ask you if that statement I just read is not dated April 26, 1940?

A. Yes, that is printed in the prospectus.

Q. Does that correspond with your recollection of when it was that offering was made? [184]

A. That is my recollection, yes.

Q. I believe those warrants simply entitled the holder to purchase one Class A common share within a certain period of time at \$7.00 per share or 80 per cent of the book value, whichever was higher. Is that right?

A. That is my recollection.

Q. Now, I believe according to the statement you have made your company as brokers did sell certain of these warrants?

A. We traded in the warrants as brokers.

Q. Traded in the warrants? A. Yes.

Q. With whom?

A. With anybody coming and offering them. Not underwriters' warrants, it was the public warrants that we were trading in. At that time there were two groups of warrants. The public subscribed for stock at the rate of five shares of stock and one warrant, that is, as I recall it. And the other class, the underwriters as part compensation for distributing the securities received these underwriters' warrants. The public warrants were registered and were able to be traded in over the counter. The underwriters' warrants were not registered prior to this registration.

Q. Prior to this registration on April 4, 1940?

(Testimony of B. P. Lester.)

A. That is correct. [185]

Q. I don't know, is there any significance to April 4th, indicating they were registered at that time?

A. Well, I would imagine that it was just at that time, because usually the prospectus is dated the date that the registration statement becomes effective.

Q. Now, I notice there O'Brien, Potter & Company. Did Northrop Aircraft have a director by the name of Mr. O'Brien that you know of at any time?

A. Yes, Mr. Roland Lord O'Brien was a director of the company.

Q. Was he a member of this O'Brien, Potter & Company, one of the underwriters?

A. Of Buffalo, New York. That is correct.

Q. Now, I believe you stated that the real basis for your opinion that these restricted shares had no fair market value on March 4, 1940, was because of these restrictions, that is one thing, the second reason being because if these promoters who constituted this, so to speak, unbeatable team, had offered their shares for sale that that would have undermined the confidence of the public in the shares?

A. I think it would have dissipated the confidence of the public in the enterprise.

Q. Well, just because those promoters should sell their shares would not necessarily mean, would it, Mr. Lester, that they would sever their connec-

(Testimony of B. P. Lester.)

tions with the company, [186] their services with the company?

A. I doubt that that would have made any difference.

Q. In other words, they would have stayed with the company just the same?

A. Another thing, in my opinion, the public was told that these particular people with their past experience, who were responsible for the success of the enterprise, would have a very substantial financial stake in the success, and I do not believe that their eliminating that financial stake before they had ever made a company go would have been anything but a bitter blow to the investors in the stock. As an underwriter of that stock I would have recommended to my customers to dump their shares as quickly as they could for anything they might get, and I doubt that they could have, I do not believe they would have received any value for the stock at that time. It was a peculiarly personal promotion, in my opinion.

Q. But each of those promoters under their contract with the company were to receive compensation for the company, weren't they?

A. Yes, very modest compensation, \$9,000.00 a year.

Q. The promoters felt that in receiving this promotion stock they were really receiving a very valuable consideration, isn't that right?

A. Well, I would assume that they would think so, in [187] my opinion.

(Testimony of B. P. Lester.)

Q. In other words, they started out at very modest salaries, didn't they?

A. Yes, in my opinion.

Q. And they left very profitable connections otherwise to give their time over to Northrop, didn't they?

A. I don't think that Mr. Northrop at the time was connected with anybody. He had previously headed up the Northrop division of Douglas Aircraft, but sometime before we put this together he had severed his connection with Douglas. Mr. Cohu had been in the securities business with his brother in New York. I could not tell you how profitable it was. The securities business was not very profitable right before that.

Q. Of course, Mr. Lester, you as an underwriter personally interested in this corporation did not expect that, having only broken ground for their plant on September 19, 1939, and having only completed their plant on February 15, 1940, you did not expect them to show any profits by March 4, 1940, did you? A. No.

Q. You expected they would go through an initial development period, isn't that right, when most everything would be going out and nothing coming in? A. That is right. [188]

Q. That is to be expected in any new business, is that right? A. That is correct.

Q. And particularly a business such as the aircraft business? A. That is correct.

Q. And particularly the fact that they did not

(Testimony of B. P. Lester.)

show any earnings to March 4, 1940, and the fact that the book value for the outstanding stock was not higher than it was at that time, that is not influencing you in reaching your opinion that this stock had no market value, is it?

A. No, not at all. I was disappointed that they did not get contracts, have contracts on the books before that, but they didn't.

Q. Well, you knew that one of their contracts dated back to December, 1939, didn't you?

A. Yes. That was a pot boiler.

Q. But that was an encouraging sign, was it not?

A. I was disappointed that in that whole fall something more tangible than some parts and some empennages had not been put on the books. I realized that there was an awful lot of work to be done getting the company organized and getting the plant going and all the things that had to be done, but I was somewhat personally disappointed that they did not go better with getting a substantial product. [189]

Q. I believe you stated that, in your opinion, the management of this corporation was excellent?

A. That is my opinion.

Q. I believe it is your opinion that the nature of the business it was in at that time was of the type and character that should cause, with the outbreak of the war, this company to receive very substantial business and assist it towards obtaining a profitable operation.

(Testimony of B. P. Lester.)

A. That was to be certainly hoped for, and I think expected.

Q. And the hopes and the expectations were subsequently justified, were they not, Mr. Lester?

A. They were.

Q. I guess, Mr. Lester, you are a close personal friend of all the petitioners in this case, aren't you?

A. Yes, now I would say I am a close personal friend of all of them.

Q. And you feel very kindly toward them?

A. That is correct.

Q. When did you first have occasion to determine in your own mind what your opinion would be as to the market value of these restricted shares as of March 4, 1940?

A. I'm afraid I don't understand that question.

Q. Did you have any occasion on March 4, 1940, to make a study of the company's circumstances then existing, [190] in order to determine whether or not these restricted shares had any fair market value and what that fair market value was?

A. It never occurred to me at any time until the last few months that it ever had any value at all, for the reasons that I have given.

Q. Did you ever have any occasion to speculate on whether it did have a value or did not have a value?

A. Never did, no.

Q. When did you first notify the Petitioners

(Testimony of B. P. Lester.)

here, Mr. Lester, of the opinion which you have now expressed?

A. I don't think I ever notified them. I think their attorneys called on me, I think first maybe a year ago the auditor of that company, as I recall it, someone connected with the auditing firm of Ernst & Ernst talked to me about the matter, and I think that I expressed myself to him as I have today. About two months ago someone from O'Melveny & Myers' office came around to ask me if I would be willing to testify. I think that was about two months ago. I said I would.

Q. In addition to the facts set out in this stipulation, in reaching your opinion did you make any further or additional independent study of the facts and circumstances?

A. No, I think as far as I know that stipulation contained everything I considered, plus a lot of other things. [191]

Q. You didn't give any weight to this sale by Ellsworth of his contract to Smith in arriving at that conclusion?

A. I considered it, but I doubt whether—I do not think the sale of that interest has anything to do with the principal reason why I felt this stock had no—these interests had no value.

Q. When did you first learn of that Ellsworth transaction, Mr. Lester?

A. About the time that he was talking to him, which I recall was in November, 1939, he came in to see me and said he was hopeful he would be able

(Testimony of B. P. Lester.)

to sell his interest. I believe he needed the money very badly for some personal obligations.

Q. Was it your understanding, Mr. Lester, that Mr. Ellsworth was under a financial strain at that time and was just more or less forced to raise some cash money?

A. No, I don't know that he was forced to. He talked to me about whether or not I thought the common stock was salable, and whether I knew of anybody that would be interested in it, and I didn't.

Q. You didn't have anybody in mind at that time. Now, in reaching this opinion of yours, Mr. Lester, what consideration have you given to the prospective value on March 4, 1940, of these shares of the stock?

A. Well, I—if they did not sell and stayed in with [192] their interests with the company, they had a good prospect, and I gave it consideration in that regard all right, because that was the only basis on which I was interested in the public shares.

Q. In other words, you felt like the success of the company was assured with these men staying in the corporation?

A. I believed there was a better than even chance with them that it would work out.

Q. It does not necessarily follow, does it, Mr. Lester, that Mr. Northrop, Mr. Cohu and these other gentlemen who were interested in organizing this corporation and who did organize it, that if they had sold their shares that they would have sev-

(Testimony of B. P. Lester.)

ered their connections with the corporation and let it go on its own, does it?

A. That would not have made any difference. I think I testified that I believed that there was an absolutely unquestioned moral obligation on the part of these men to stay by that company, and the fact that the public understood that would operate to make a better market on the securities, and if any one of them had violated that obligation to me, I would have turned my back on that company and I would never have had any further business dealings with any of the five of them.

Q. Do you mean you would have taken some personal offense? [193]

A. I would have taken complete personal offense, yes, because I would think that it was an obligation that they were bound by and that they were observing.

Q. You mean you would take such personal offense that you would do anything you could to destroy that corporation?

A. I would do everything I could to save it, and I think the salvation of anybody's interest then would have been to find out where you could put the enterprise into the hands of some other management to have salvaged all the assets that were left.

Q. But you would not have done anything to jeopardize it?

A. I would have done everything to prevent it.

Q. But if one of these gentlemen had sold out

(Testimony of B. P. Lester.)

his shares, you don't mean that you would have gone to your customers and told them to sell all of their shares for anything they could get for them, do you, Mr .Lester?

A. I do, up to the point where there was no orderly market left. From then I think it would have been a matter of calling the stockholders together and attempting to salvage the market.

Q. Now, Mr. Lester, think of the great demand for military aircraft at that time. Now, Mr. Northrop is the head designer and engineer of this corporation, and Mr. Cohu with his experience, Mr. Irving with his experience, don't [194] you think that that corporation would have been a success, that it would have gotten business, regardless of whether these promoters owned any shares in the corporation or not?

A. Yes, I think they might have gotten some business all right, but I think it would have been in a very prejudiced condition in the trade, and right in there we were having trouble enough getting contracts as it was. If we had had to compete with management outside who certainly would have made capital of the fact that they were telling the Government agencies that the principal officers of the company were running off trying to sell their interest, I think we would have had a very hard time getting any work in the enterprise at all. All during the early stages our principal competitors were saying that we could not do the work. We lost one job on that account. If they had been able to

(Testimony of B. P. Lester.)

accompany that with the statement that the principal owners of the corporation did not have enough faith in the enterprise to hold the interest that was given them for the incentive purposes, I think the enterprise would have been so prejudiced in obtaining work that, in my opinion, you would have had only a salvage operation.

Q. A salvage operation at that time, with all this demand for military aircraft, with Mr. Northrop's experience and reputation as an aircraft designer and developer and manufacturer? [195]

A. I think so. I think it would have been as bad for the enterprise as if Mr. Northrop had left, discontinued his services to it.

The Court: We will take a recess.

(Short recess taken.)

The Court: Proceed.

Q. (By Mr. Maiden): Mr. Lester, the company was interested in keeping the services of Mr. Northrop, Mr. Cohu and Mr. Irving, were they not? A. They were.

Q. And it was for that reason, I take it, that in the agreement with those gentlemen, it was stipulated in that agreement that if these men failed to abide by their agreement to stay with the company, that then the company would recapture approximately 60 per cent of their B shares at a price of 25 cents a share, isn't that right?

A. That is my recollection, yes.

Q. Wouldn't you say that that provision gave

(Testimony of B. P. Lester.)

pretty substantial assurance that these men would abide by their agreements with the company and would stay with the company and render the company their services?

A. It should be persuasive.

Q. They, of course, appreciated the value of these shares that they had, didn't they, Mr. Lester, wouldn't you say? [196]

Mr. Wall: I would object to that, your Honor. I don't think Mr. Lester can tell that.

The Court: I don't suppose he can answer that.

Mr. Maiden: No, I guess not, your Honor. He seemed so well informed, though, generally, about the whole thing.

The Court: I think that is a bad precedent anyway.

Mr. Maiden: Yes, I think so.

By Mr. Maiden:

Q. Are you aware, Mr. Lester, that Mr. Cohu in June or July of 1940 transferred a portion of his escrowed shares to members of his family?

A. Yes, I recall that.

Q. Are you likewise aware of the fact that Mr. Northrop in the early part of 1941 likewise transferred in escrow a certain portion of his shares?

A. Well, as I recall it, both these gentlemen made some family arrangements with reference to the stock. I am not familiar with the details but I know that that was being—I understood it was being done.

Q. Isn't it a fact that following the release of a certain portion of these A shares from escrow in

(Testimony of B. P. Lester.)

1940, that some of these gentlemen sold some of these Class A shares issued to them at that time?

A. I think Mr. Cohu along in the end of 1940 sold some [197] shares. I mean, I was not informed that anyone else had.

Q. Did the fact that Mr. Cohu and Mr. Northrop made transfers in escrow of their restricted shares, did that shake your faith in the company or cause you to believe that the company should be liquidated?

A. Not in view of the fact that they were to members of their immediately families.

Q. Suppose those gentlemen had sold, on March 4, 1940, these shares that they received from the company; would that necessarily have been public property so as to have shaken the faith of the public in this company?

A. Well, you are required as an underwriter of the stock in handling sale of those shares for 13 months to furnish a copy of a prospectus. Those prospectuses that we use in connection with the offer of securities are required to be kept alive for 13 months, and we would have been compelled to make that public and give that public knowledge, because we should have amended the prospectus and would have done so in connection with those sales.

Q. But in doing that you would have referred to the fact that you had firm contracts with those gentlemen that they would stay with the corporation and that they would render their services to the corporation, and that if they did not stay with the corporation that the company could recapture from

(Testimony of B. P. Lester.)

them a great portion, about 60 per cent of their Class B [198] shares, isn't that correct?

A. Well, you would not have changed the material in the prospectus in any other respect than to show the fact that they sold, but my point is, had they sold it would not have mattered what was in the prospectus, you would not have had a purchaser.

Q. Do you mean to tell me that it is your opinion that there would not have been any buyers at any price for those shares in this war industry, on March 4, 1940? A. Well, you might have had——

Q. I mean, I want to be perfectly fair about it.

A. I think you might have had an occasional sale, very largely, in my opinion, to uninformed people. The fact that, for instance, there was a market for this stock, as I recall it, in May or in April which ran as high as about \$8.00 a share—now, to the best of my recollection I don't think we ever had a transaction in which we sold stock at that time higher than \$8.00 a share, that was about the then current market. At that same time, the right to subscribe for stock at \$7.00 a share, which is what these warrants provided, was selling about \$3.00 or \$3.50 in limited amounts. Now, there is a certain amount of fringe gambling in the thing anyway, and I certainly would not say that there would not be some sales of stock, but a regular market for the securities, and I am talking of a market which would— [199] where it would be more than just a few uninformed speculators, I think would have vanished, because of the peculiar relationship of these people

(Testimony of B. P. Lester.)

to this enterprise until it got over the hump. Now, when it gets over the hump, that is again a matter that people can differ on, when it is established——

Q. Mr. Lester, it is not necessary, is it, for the management of the company to be the stockholders of the company?

A. No, in most instances, at least certainly in many instances that is not a necessary thing at all. A great many companies are not.

Q. Again, can an official of the company be deeply interested in the company and give his all to that company, even though he does not own any stock in the company.

A. That very frequently happens, I think.

Q. Wouldn't you have expected Mr. Northrop to have remained with this corporation and to have given his full services, and just as much so, even if he didn't own any shares?

A. Well, sir, I think I testified that if Mr. Northrop had sold his shares I would have taken it and I think the public would and I believe every other underwriter would, as a complete repudiation of an understanding and a moral obligation not to liquidate his interest that way.

Q. Now, there is one other little thing I want to get [200] straightened out, Mr. Lester, about these warrants. Suppose I purchased a warrant and paid \$3.00 for it, then when I went to buy one of those Class A shares with it, we will say that \$7.00 was the highest value, was greater than 80 per cent of the book value, then I would have to pay the company \$7.00 for the share, so that the share actually would

(Testimony of B. P. Lester.)

have cost me \$10.00? A. That is correct.

Mr. Maiden: I believe that is all, your Honor.

The Court: Any redirect?

Mr. Wall: Yes, if your Honor please.

Redirect Examination

By Mr. Wall:

Q. Mr. Lester, during your cross-examination you testified, I believe, that you assumed that the promoters involved considered this stock to have substantial value. Did you mean that statement to alter in any way your testimony as to your opinion concerning its fair market value on March 4, 1940?

A. Not at all.

Q. A moment ago you made a statement that the market on these shares in May was at one time as high as \$8.00. Were you referring there to the public shares issued to the public?

A. I was referring to the unrestricted Class A shares. [201]

Q. Not to the shares issued to the promoters?

A. Not at all.

Q. In your opinion, Mr. Lester, does the fact that some warrants were sold at a price, let us say \$3.00, which, as Mr. Maiden has pointed out, would mean if the holder of that warrant purchased the stock at \$7.00 the ultimate cost of the stock to him was \$10.00, does the fact that some warrants were sold on that basis, in your opinion, indicate any fair market value for the promotional shares here under consideration? A. Not in my opinion.

Q. Can you give your reasons for that, Mr. Lester?

(Testimony of B. P. Lester.)

A. Well, the market for warrants to subscribe to stock in the company is, you might say, a call on stock at a price. Now, strange as it may seem, whenever there are warrants outstanding, in most instances they sell at a premium above the then market price of the shares plus the amount of the warrant. In other words, it is not unusual for a warrant that calls for delivery of stock any time up to five years at \$7.00 to sell at \$3.00 while the stock itself then is only selling at \$7.00 or \$8.00, because there seems to be a segment of the public that in a limited sort of a way likes to speculate in just that type of thing, when he does not put up all his money or have to put up the larger part of it for a long period of time. It is a call. And that, I think, [202] has been the history of most securities of that kind. There have been a great many companies that have issued warrants, calls on stock in the future, in the hopes that they will be exercised and some additional capital raised that way.

Q. Would a purchaser of one of those warrants be able to turn around and sell it on the market within a reasonable length of time?

A. Well, there was a market, I think, during this whole period that has been discussed here, for warrants, a limited market. There were not many warrants traded, but they traded in a very fairly constant range all the time.

Q. Mr. Lester, were these warrants deliverable negotiable securities, in the language of the securities business?

A. Yes, they were in form for good delivery.

(Testimony of B. P. Lester.)

Q. Mr. Lester, you have testified on cross-examination something concerning the purchase of the 30,000 shares by the Atlas Corporation. Did the Atlas Corporation approach you or approach the group of underwriters in an effort to buy those shares?

A. No. We started out offering the shares of Northrop, and very frankly, they were not well received at all. After, I think, about ten days or two weeks of trading, there was a very, very small amount of stock sold, or subscribed for.

Q. What time are you talking about now? [203]

A. I am talking about June 21, 1939.

Q. It is in evidence that the offering began, I think, July 21, 1939. Does that refresh your recollection, the offering of the underwriters to the public?

A. The offering by the underwriters to the public, the first offering of shares to the public. That went so badly that we held several underwriters' meetings with the promoters, and we felt that the hope for successful distribution of the stock to raise the capital that was required rested on our being able to obtain some group or investment company that had the reputation of being an initiated investor to take a very substantial interest in the stock of the company. At one of those meetings we discussed a list of people, among them the Atlas Corporation. I had been acquainted since 1920 with Mr. Floyd B. Odium, who is president of the company, and Mr. Northrop had been acquainted with Mr. Odium and with Mrs. Odium, who was a flyer, for some years past.

Q. Mr. Odium was Jacqueline Cochran, was she not?

(Testimony of B. P. Lester.)

A. That is correct. I phoned Mr. Odlum the next morning and asked him if he would entertain such a thought. He said he would if we could come to New York and discuss it with him, and that noon Mr. Northrop and I flew to New York and talked with Mr. Odlum the following evening. The outcome of these conversations was that about ten days or two weeks later the Atlas Corporation made a subscription. [204]

Q. Those are the circumstances, then, under which Atlas was interested in the proposition?

A. That is correct. I might say that accomplished what we believed it would, in that it gave approval to the promotion from an informed investor.

Mr. Wall: That is all.

Recross-Examination

By Mr. Maiden:

Q. I notice a statement in the prospectus, which is Exhibit 1-A to the stipulation, Mr. Lester, to the effect that "Each of the underwriters has advised the company that it has no unsold unwritten or agency units as of March 26, 1940, except that Lester & Company advised the company that at said date it owned in addition to underwriters' warrants 1,430 shares of Class A common stock and 337 public warrants, and Air Investors, Incorporated, advised the company that it owned 600 units which were being retained by it as an investment." You understand that to be the fact? A. Yes, I do.

Mr. Maiden: I believe that is all, if your Honor please.

The Court: That is all, Mr. Lester.

(Witness excused.)

The Court: Call your next witness. [205]

Mr. Wall: I will call Mr. Henry Bateman, if your Honor please.

Whereupon,

HENRY M. BATEMAN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Henry M. Bateman, 555 Muirfield Road, Los Angeles, California.

Direct Examination

By Mr. Wall:

Q. What is your business or occupation, Mr. Bateman? A. I am an investment dealer.

Q. Are you associated with the firm of Bateman, Eichler & Company of this city? A. I am.

Q. And are you an officer of that firm?

A. I am president of that firm.

Q. How long have you been engaged in the securities business, Mr. Bateman? A. 27 years.

Q. Was your firm of Bateman, Eichler & Company one of the underwriters on the Class A common stock of the Northrop Aircraft, Inc., to be offered to the public in 1939? [206] A. It was not.

Q. Was your firm ever approached with a proposal that you become a member of that group of underwriters? A. It was.

(Testimony of Henry M. Bateman.)

Q. What was the action of your firm on that proposal?

A. We declined to become a member of the underwriting group.

Q. Do your activities in the investment business, Mr. Bateman, involve the determination of the value of securities of various types? A. Yes.

Q. Does that include stocks as well as bonds?

A. Yes.

Q. Has your experience in that connection included aircraft securities? A. Yes.

Q. And securities of new enterprises?

A. Yes.

Q. In what way do your activities involve the valuation of securities, Mr. Bateman?

A. I am in charge of the underwriting activities of our firm. I also serve a number of personal clients, I give advise to a number of personal clients.

Q. And for the purpose of determining whether or not you will underwrite a particular issue, it becomes necessary [207] for you to determine values of securities, does it?

A. That is the first thing you have to do when you start buying a security.

Q. And the same is true, I assume, in advising those clients that you mention? A. Yes.

Q. Would you please enumerate briefly the elements of valuation that you customarily consider important in valuing a common stock?

A. I would say that the first thing we consider is the nature of the company's business, whether or not it is a stable business, whether it is a business

(Testimony of Henry M. Bateman.)

that is continuing, that is, where the company's products are products that are in demand over long periods of time, not specialized products.

I would say the second thing that we give consideration to is management. I believe thereafter we would consider as of next most importance the future prospects of the company as to future business. We then give consideration to the financial condition of the company, whether or not it has insufficient capital to engage in business, whether it has plant facilities. There are a number of other things that ultimately come into consideration, but those are the most important.

Q. Now, Mr. Bateman have you made a study of the facts in this case as set forth in the stipulation which has been filed in the matter? [208]

A. I have.

Q. Did your study include the Articles of Incorporation of Northrop Aircraft, Inc., and particularly the provisions of Article 5 with respect to Class B shares of that company? A. Yes.

Q. Did your study include the contracts between the company and the respective promoters dated June 17, 1939? A. Yes.

Q. Did your study include the terms of the Corporation Commissioner's Permit of June 15, 1939?

A. Yes.

Q. And particularly the conditions specified in that permit as being applicable to the shares issued to the promoters? A. Yes.

Q. Are you familiar with the agreement between the company and the respective promoters dated as

(Testimony of Henry M. Bateman.)

of November 30, 1939, whereby the promoters waive their rights to participate in dividends and in distribution of assets in accordance with the Corporation Commissioners' Permit? A. I am.

Q. Were you present in the court room during the testimony of Mr. Claude M. Monson with respect to the business condition and prospects of Northrop Aircraft, Inc., on or about [209] March 4, 1940?

A. I was.

Q. Have you reviewed the balance sheet of the company as of February 29, 1940?

A. I have.

Q. Are you familiar with the information set forth in the stipulation in Paragraphs 40 to 43, concerning orders on file with the company on March 4, 1940, the fact that it then made no sales deliveries, the fact that it then had 142 employees, and the fact that it only shortly before that time had completed the erection of the factory at Hawthorne, California?

A. Yes.

Q. Are you familiar with the information set forth in Exhibit 19-U to the stipulation regarding the number of unrestricted public Class A common shares purchased and sold by Lester & Company during the period from November 9, 1939, to March 8, 1940, and the price at which those shares were purchased and sold?

A. Yes, in a general way.

Q. Now, Mr. Bateman, for the purpose of answering the question I am about to put to you, I will give you the following definition of the term fair market value. By the term fair market value is meant

(Testimony of Henry M. Bateman.)

the fair value of property in money as between one who wishes to purchase and one who wishes [210] sell, that is, the price at which a seller wishing to sell at a fair price and a buyer willing to buy at a fair price will trade, neither being under any compulsion to trade, and both having a reasonable knowledge of the facts. I caution you that the prices at which stock was sold on an over-the-counter market or stock exchange are not necessarily controlling in fixing the fair market value of that stock, although such prices are a factor to be considered along with other factors of valuation. I also caution you that sales made under peculiar and unusual circumstances, such as sales of small lots and sales in a restricted market are not necessarily controlling in fixing fair market value. In formulating your opinion and in answering the question I am about to put to you, Mr. Bateman, I will ask you to put yourself back at March 4, 1940, disregarding all facts occurring after that date, and limit yourself to the facts which were known on or before that date or could then have been reasonably anticipated. What, in your opinion, Mr. Bateman, was the fair market value on March 4, 1940, of the Class A common shares of Northrop Aircraft, Inc., which were issued to Messrs. Northrop, Cohu, Irving, Bellande and Stephens as promoters of that corporation?

A. In my opinion, those shares had no market value.

Q. What, in your opinion, was the value on March 4, 1940, of the Class B common shares of Northrop

(Testimony of Henry M. Bateman.)

Aircraft, Inc., [211] which were issued to those gentlemen as promoters?

A. In my opinion, they had no market value.

Q. Will you please state the reasons on which you base the opinion you have just expressed, Mr. Bateman?

A. Yes. To start with the Corporation Commissioner when he permitted the Northrop Aircraft Company to sell the public shares imposed a condition first, that the company enter into an agreement with Northrop and the other gentlemen under which they agreed to waive all distributions to stockholders of the company to which they might be entitled as the owner of the restricted A shares, during such period that the shares were to be held and held in escrow; that further, the agreement further provided that they would waive all dividends which the company might declare on shares of the company to which they might be entitled during the period that their shares were held in escrow. The Corporation Commissioner further provided that all of the promoter's shares issued to them must be held in escrow until such time as he might permit their withdrawal. We know—I know from the stipulated facts that the escrow agent had been appointed by a separate appointment, and as of March 4, 1940, the shares were issued and placed in escrow with the Bank of America as the escrow agent. I further know that the Corporation Commissioner at that time, and I think this is still his rule, and I believe—— [212]

Mr. Maiden: If your Honor please, I object to this witness testifying as to what the Corporation

(Testimony of Henry M. Bateman.)

Commissioner's rules and regulations are. That is a matter of law, and as to what the Corporation Commissioner would do at any time is certainly solely within the knowledge of the Corporation Commissioner, upon the basis of the facts presented to the Corporation Commissioner at any particular time.

The Court: You anticipate he is starting to tell that.

Mr. Maiden: That is what I think he is, yes, sir.

The Court: Well, you better not state what the Commissioner would do.

The Witness: May I say that I believe it is the stipulation in this case?

Mr. Wall: There are attached to the stipulation certain rules of the Corporation Commissioner, Mr. Bateman. Though it would not be proper for you to testify as to what the Commissioner would do in any particular case, I think Mr. Bateman, however, can take into consideration the rules which are attached to the stipulation in making his statement.

The Court: Yes, he may do that.

By Mr. Wall:

Q. Would you like to see those rules, Mr. Bateman? A. I would, please.

Q. That is Exhibit 10-J to the stipulation which I am [213] now showing the witness.

A. Ordinarily shares issued as promotion shares may be considered for release from escrow when the holders of shares sold under a permit have received a return in the form of dividends equal to the sale price, or when the net tangible assets of the company approximate the aggregate par value or stated value

(Testimony of Henry M. Bateman.)

of the non-par shares outstanding, or when a successful earning record is shown for three successive years.

Q. What were you reading then, Mr. Bateman, what section?

Mr. Maiden: You did not complete reading that, did you, Mr. Bateman? Isn't there a further statement there, that the action of the Commissioner will be based upon the facts and circumstances of each particular case?

The Witness: Yes.

By Mr. Wall:

Q. That was reading from Section 7 of Chapter 9 of the regulations of the Commissioner attached to the stipulation which is in evidence.

A. On March 4, 1940, the stockholders of Northrop Aircraft had received no distributions. On March 4, 1940, no dividends had been declared, on the capital stock of the company. On March 4, 1940, the net current assets per share of the company, including the shares of promotion stock, did [214] not equal the price named in the permit of the Commissioner of Corporations, and on March 4, 1940, the company had no earning record to show to the Corporation Commissioner. Therefore, on March 4, 1940, a prospective purchaser of any of those restricted shares would have first, he would have had to get the permission of the Corporation Commissioner to transfer the shares; he could not have anticipated when those shares might have been withdrawn from escrow; he could not have anticipated when the company might have shown earnings, when the company might have built up sufficient assets to make the net

(Testimony of Henry M. Bateman.)

tangible assets per share equal to the permit price; he could not at that time anticipate, in my opinion, the growth possibilities of the company. Therefore, any prospective purchaser or any individual to whom those—I will phrase that differently. Therefore, in my opinion, that stock on that date, by very reason of the conditions imposed by the Corporation Commissioner, were not marketable securities and therefore had no firm market value as of that date.

Q. Does your statement, Mr. Bateman, apply to both the Class A and Class B shares that were placed in escrow?

A. If it applies to the Class A it must apply to the Class B. It applies to both classes of stock.

Q. Did you give consideration in reaching your opinion, Mr. Bateman, to the restrictions of the Articles of [215] Incorporation relating to the Class B shares alone which did not relate to the Class A shares? A. Yes.

Q. What weight did you give to those restrictions, if any?

A. In my opinion, the main things that caused me to believe that the stock had no fair market value at that time were the facts that I have brought out, with reference to the fact that they were so restricted that the purchaser could not anticipate when he might get his securities, and because of the conditions he could not anticipate at that time whether or not he would ever receive them, inasmuch as the agreement with Mr. Northrop and the others provided that while those shares were held in escrow they waived all distributions and all dividends; a condition might

(Testimony of Henry M. Bateman.)

arise whereby the company would never have made earnings, the company conceivably might have gone bankrupt, and an informed buyer must have taken into consideration the fact that all he was buying was a call on stock if the company was successful. Actually that is all, in my opinion, that Messrs. Northrop and the others had.

Q. Did you take into consideration, Mr. Bateman, the fact that the company at that time had no product ready for sale, and the fact that it had only a few orders on its books?

A. Naturally that had to be taken into consideration. Had the company had on its books the contracts that it had a [216] year later, it would have made an entirely—presented an entirely different picture.

Mr. Maiden: They would have a fair market value had that been true, is that right?

Mr. Wall: Just a moment, Mr. Maiden. Would you mind waiting for your cross-examination until I have finished the direct?

Mr. Maiden: Would you mind letting him answer that question?

Mr. Wall: No, he can answer that.

The Witness: What was the question?

Mr. Maiden: Mr. Reporter, would you read it?

(The question was read.)

The Witness: The amount of orders that they had on their books would have had to have been taken into consideration in determining a market value, but by the time of 1940, you would also—by the end of 1940 you would have had to have taken into con-

(Testimony of Henry M. Bateman.)

sideration, you would have had to take into consideration what the company had earned in the past. There are a lot of things that go to the making up of market value. Now, we are concerned here, it seems to me, with something that is different from the market value on the unrestricted shares. We are here considering restricted shares and when we do, in my opinion, all of the prospects of the company and the orders on the books of the company have a [217] bearing in this case as to whether or not we could lead an informed buyer to believe that he might have a prospect of getting delivery of the securities, for the securities might have become void through the company going out of business and distributing what assets it had to the public stockholders, leaving the A stock and the B stock of these men worthless.

Q. In arriving at that opinion, Mr. Bateman, did you give consideration to the status of the European war as of March 4, 1940?

A. Well, that had, that would have had a considerable bearing at the time, and I gave it consideration. As I remember the European war, in March of 1940 a lot of people were very confused as to what was happening, whether we had an actual war that was going to become a world war. We know that all nations, all of the democratic nations were arming in anticipation that the worst might happen, but insofar as the public was concerned, we didn't know, I didn't know what was going on. I could not understand, with war having been declared in March, that something was not happening more than had

(Testimony of Henry M. Bateman.)

happened. War had been declared—did I say March?

Q. You said March.

A. I mean September of 1939.

Q. September of 1939? A. Of 1939. [218]

Q. In arriving at your opinions, Mr. Bateman, did you give consideration to the size of the stock holdings involved of these various promoters in relation to the indication of the number of shares being sold at that time by Lester & Company and purchased by Lester & Company?

A. Very little, very little. Had I been approached to handle a thousand of those shares, I would have said no just as quickly as for 50,000.

Q. In arriving at your opinion that you have expressed, Mr. Bateman, did you give consideration to the provisions of the agreement between the company and the respective promoters, which in the case of Messrs. Northrop and Cohu and Irving did give the company an option to buy 60 per cent of their Class B shares at 25 cents a share under certain conditions?

A. I gave some consideration to it, but again I say that I didn't think that that was an important factor in my arriving at the opinion that the stock had no market value.

Q. In other words, as I understand you, your opinion applies on Class A and Class B shares alike, without regard to the specific restrictions on the Class B shares? A. That is right.

Q. Did you give consideration to the transaction whereby Mr. Ellsworth in November of 1939 exchanged his contract with the Northrop Company for

(Testimony of Henry M. Bateman.)

2,200 shares of Duvall Texas Sulphur Company stock? [219] A. Yes.

Q. What weight, if any, did you give that transaction?

A. Well, I gave practically no weight to that transaction. A clever salesman can negotiate the sale of almost any article or any security. That has been done in connection with gold bricks. That, in my opinion, the price at which an article or security is negotiated over a long period of time with some buyer, whether or not he is informed, does not necessarily establish a market value of an article or security in question.

Mr. Wall: That is all.

Cross-Examination

By Mr. Maiden:

Q. There is no evidence in this record, is there, Mr. Bateman, that you have seen or that you have heard that would indicate that Ellsworth's sale to Mr. Smith was handled by a slick salesman?

A. I didn't say a slick salesman.

Q. A slick broker? A. No, sir.

Q. What did you say in that respect?

A. Let the reporter read it.

Q. Just go on and tell me what.

A. I said that a clever salesman—he asked what weight I gave to that transaction, and I said none, practically [220] none, because I said a clever salesman can negotiate the sale of any article or security, I believe.

Q. I beg your pardon. Is there any evidence in this record that you know of, either in the stipula-

(Testimony of Henry M. Bateman.)

tion or what you have heard testified to, that Mr. Smith was not a well informed purchaser at the time he made that purchase of Mr. Ellsworth?

A. I believe that Mr. Smith was a very well informed purchaser.

Q. Would not that influence you in determining whether or not several months later stock, when it had actually been issued, had a fair market value, if at an antecedent date simply a contract right sold for a valuable money consideration? A. No, sir.

Q. I believe the sense of your opinion is that this stock, in your opinion, had no fair market value because in your opinion it was not marketable at that time, is that right? That is really the sense of your entirely testimony, isn't it, Mr. Bateman?

A. No, not at all. My opinion that the stock had no fair market value at that time is based largely on the fact that on March 4, 1940, no prospective purchaser of that stock could have any real reason for believing or knowing that the company was going to be successful, and—— [221]

Q. Mr. Bateman, just one second, please. Do you mean to tell me that on March 4, 1940, following the outbreak of the war in Europe on September 1, 1939, despite our national defense program in this country, despite the feverish effort of a number of European democracies to arm themselves sufficiently to withstand Hitler's assault which they anticipated in the spring of 1940, do you mean to say that on March 4, 1940, a company engaged, set up for the purpose of manufacturing one of the most important tools of modern warfare, a military air-

(Testimony of Henry M. Bateman.)

craft, and built around men of such outstanding ability and reputation as this company had, do you mean to say that on March 4, 1940, taking into consideration all those things, that there was no reasonable basis for any informed person believing that this company had a great future in the aircraft industry and had a great opportunity to develop itself and to operate profitably?

A. Well, I can say to you that if anything had been done between September 1, 1939, and the date that Hitler invaded the Low Countries to patch up the differences, to have some kind of a peace, that the armament program of the United States as well as the European countries would have slowed down to a walk and we have heard Mr. Lester testify to the fact that this country in the spring of 1940 already had spent too much money and was then in straitened circumstances. [222]

Q. But in the event of a peace, as you say, it would have just been an armed truce, wouldn't it, Mr. Bateman?

A. Well, you are asking a little too much of me. I am just a security dealer.

Q. Do you have knowledge of the fact that on March 4, 1940, the relations of the United States and Japan were in a very critical condition?

A. I have been in California for a great many years, and relations between California and Japan have been strained from time to time.

Q. And the United States, in fact?

A. I knew on December 7, 1941, that the rela-

(Testimony of Henry M. Bateman.)

tions with Japan were very strained, but up to that time I knew what I read in the newspapers.

Q. Mr. Bateman, just fairly now and frankly, I am going to move you back to March 4, 1940, and you are in the investment business. Wouldn't you and didn't you consider at that time that investments in American companies that were engaged in the production of war tools and material offered very bright prospects for an investment standpoint, taking into consideration the conditions brought on the world by the war in Europe?

A. Sir, that question would be just about the same as if an investor would come in to me tomorrow and ask whether to buy a stock or not to buy, and not name the specific stock. [223] Here was a company, the Northrop Aircraft Company, that was a promotion pure and simple. The promoters of this company put not one red nickel into this company. The public put up all of the money.

Q. That is not unusual, is it, Mr. Bateman?

A. Very unusual, very unusual.

Q. But it was done?

A. The situation was such that when I was invited, and I sat in, they called me down to a meeting and I heard the story, and I declined to become an underwriter. I also declined to sell any stock for the selling group. My organization handled no stock of that company. Later on we may have executed an agency order for the stock, but we sold no stock to our customers. We considered the stock too speculative to sell to our clients.

(Testimony of Henry M. Bateman.)

Q. Well then, if all the underwriters had been of the same opinion that you were, then it is obvious that this company never would have been organized, isn't that right?

A. That is exactly right.

Q. You could not see on March 4, 1940, that there would be any profits in an industry engaged in the manufacture of war equipment, is that right, Mr. Bateman?

A. I could see that there were tremendous profits to be made by certain companies. This company had had to start in the business with great competition, and there was great [224] competition.

Q. What study had you made then of the demand conditions for that product and of the existing industry's ability to meet that demand at that time? What study had you made of that, Mr. Bateman?

A. I have not made a detailed study of that, but I can call attention to evidence that has been presented in this case. It was not until 1941 that aircraft companies began to operate on a cost-plus basis. In 1940 they were all out fighting for business and bidding fixed prices to get business and they don't do that if the demand is greater than their capacity.

Q. In other words, it is your opinion, is it, that on March 4, 1940, there was no more than the usual demand for military aircraft, is that right?

A. There was great demand, the demand was growing all the time. I think the demand for mili-

(Testimony of Henry M. Bateman.)

tary aircraft, if I had to give you the time, my opinion is that it would be about 1937.

Q. When the demand started for military aircraft? A. Yes.

Q. But that demand was greatly accelerated, all out of natural proportion, wouldn't you say, by the critical developments in Europe and the outbreak of war on September 1, 1939?

A. Yes, but in my opinion all of the leading aircraft [225] companies that were in business had increased their facilities during that time to take care of greater business.

Q. I understood you to say that you had not made any investigation or study to determine to what extent the existing industry was capable of meeting that demand.

A. You can't engage in the security business without being informed about all kinds of business. I said I had made no detailed study.

Q. All right. Now I want to find out just to what extent you did make your study, and I want you to tell me approximately the amount of business that leading aircraft companies in the United States had as of March 4, 1940, and I want you to tell me their then-existing physical capacity to take care of those orders.

A. I can't give you those figures.

Q. Mr. Bateman, were you ever called on to try to sell any of these promotional shares?

A. By the Northrop Aircraft Company?

Q. Yes.

(Testimony of Henry M. Bateman.)

A. I have already testified that we were invited.

Q. You are aware of the fact that the Corporation Commissioner's regulation provide for the sale and transfer of shares in escrow, aren't you?

A. That is right, yes.

Mr. Maiden: I believe that is all, your Honor.

Mr. Wall: No further questions.

The Court: That is all, Mr. Bateman.

(Witness excused.)

The Court: We will adjourn until 10:00 o'clock tomorrow morning.

(Thereupon, at 4:45 p.m., an adjournment was taken until the following day, Wednesday, November 13, 1946, at 10 o'clock a.m.) [227]

November 13, 1946—10:00 a.m.

The Court: We will proceed now with the hearing in the Cohu and other cases.

Mr. Wall: Very well, your Honor. I will call Mr. Justus A. Hahn, your Honor.

Whereupon,

JUSTUS A. HAHN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Justus A. Hahn, 845 South Plymouth Boulevard.

(Testimony of Justus A. Hahn.)

Direct Examination

By Mr. Wall:

Q. What is your business or occupation, Mr. Hahn?

A. Assistant Commissioner of Corporations, State of California.

Q. Are you in charge of the Los Angeles office of the Commissioner of Corporations?

A. Yes, that is right.

Q. How long have you held that office as Assistant Commissioner? A. A good many years.

Q. Did you hold that position in 1939? [231]

A. Yes.

Q. Is it customary, Mr. Hahn, for the office of the California Corporation Commissioner to require promotional securities to be held in escrow for a period? A. Yes, it is.

Q. Are you familiar with the general practice of the Corporation Commissioner's office as it existed in 1939 with respect to the approval of escrow holders of corporate securities which are required to be appointed under the terms of permits issued by the Commissioner? A. Yes.

Q. What was the general practice in 1939 in the Corporation Commissioner's office, Mr. Hahn, with respect to approving as an escrow holder for securities under such a permit a national banking association with trust powers doing business in California, such as the Bank of America National Trust and Savings Association, or the Security-First National Bank of Los Angeles?

(Testimony of Justus A. Hahn.)

A. They would be proper as such escrow holders.

Q. Would the same apply, Mr. Hahn, to a bank like the Farmers & Merchants National Bank of Los Angeles? A. Yes.

Q. The Citizens National Trust & Savings Bank?

A. Yes.

Q. The California Bank? [232] A. Yes.

Q. Union Bank and Trust Company?

A. Yes.

Mr. Wall: That is all, your Honor.

Mr. Maiden: No questions.

The Court: That is all.

(Witness excused.)

[Endorsed]: T.C.U.S. Filed Dec. 4, 1946. [233]

In the United States Circuit Court of Appeals
for the Ninth Circuit

T. C. Docket No. 5041

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Now comes John K. Northrop, petitioner in this cause, by his attorneys, Maynard J. Toll, Sidney H. Wall and George F. Elmendorf, and petitions for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The

Tax Court of the United States rendered on June 18, 1947, determining a deficiency in petitioner's federal income tax for the calendar year 1940 in the amount of \$57,474.19. In support of his petition, petitioner respectfully shows:

1. VENUE

Petitioner on review (hereinafter sometimes called "petitioner") is a resident of the County of Los Angeles, State of California. Petitioner's return of federal income tax for the calendar year 1940, in respect of which the asserted liability arises, was filed with [234] the Collector of Internal Revenue for the Sixth District of California, whose office is located in Los Angeles, California, within the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit.

2. NATURE OF CONTROVERSY

The controversy relates to the proper determination of the petitioner's liability for federal income taxes for the calendar year 1940. The basic questions are (a) whether or not certain stock received by petitioner constituted a realization of income by petitioner (to the extent of petitioner's community one-half thereof) in 1940, and (b) if so, what was the amount thereof.

Petitioner, an aeronautical engineer and aircraft designer, was one of the promoters of Northrop Aircraft, Inc. (herein called the "Company"), a California corporation organized in March, 1939, to engage in the business of designing and manufacturing aircraft and aircraft parts. The Company was

authorized to issue two classes of stock, known as Class A Common and Class B Common.

On June 17, 1939, a contract was entered into between petitioner and the Company by which the Company agreed, in consideration for the use of petitioner's name, his past promotional services and his agreement to be employed by the Company to take charge of engineering and design for five years, to issue to petitioner certain of [235] its Class A and Class B shares on the basis of a specified ratio to the number of its Class A shares which should thereafter be sold to the public.

Pursuant to a permit issued by the California Corporation Commissioner on June 15, 1939, the Company, from July 21, 1939, to November 28, 1939, sold and issued 250,000 of its Class A shares to underwriters for distribution to the public, receiving \$5 per share therefor. The sale of the 250,000 Class A shares by November 28, 1939, entitled petitioner, under his contract with the Company, to 15,384 Class A shares and 38,461 Class B shares.

The Corporation Commissioner's permit required that all the shares to be issued to petitioner pursuant to his contract should be held in escrow until released by the Commissioner, prohibited sale of any such escrowed shares without the Commissioner's consent, and required certain waivers of petitioner's rights to receive dividends and to participate in distributions of assets while the shares were held in escrow.

The Company, in June, 1939, designated the escrow holder pursuant to said permit. The Corpora-

tion Commissioner's approval of said escrow holder was sought and obtained, and the required waiver of petitioner's rights with respect to dividends and assets was executed and filed, in January, 1940. The certificates representing the Class A and Class B shares in question were issued in [236] petitioner's name on March 4, 1940, and were forthwith placed in escrow pursuant to the conditions of the permit. They remained in escrow subject to such conditions until October 26, 1942, except that on November 19, 1940, one-third (or 5240) of petitioner's Class A shares were released by order of the Corporation Commissioner.

In addition to the restrictions contained in the Corporation Commissioner's permit, the Class B shares issued to petitioner were, under the Company's articles of incorporation, restricted as to receipt of dividends and as to distribution of assets on liquidation, and were to become void on August 1, 1944, if no adjusted net profits were theretofore earned by the Company; they were to become convertible into Class A shares on or before August 1, 1944, only if specified earnings requirements per Class A share had been met.

Furthermore, 60% of the Class B shares issued to petitioner were, under his contract with the Company, subject to an option in the Company to repurchase at 25 cents per share in certain events.

The Commissioner of Internal Revenue determined that the Class A and Class B shares issued to petitioner were received by him on March 4, 1940, when the certificates representing such shares

were issued and placed in escrow, and that they constituted income in that year, to the extent of his community one-half thereof, in the amount [237] of their fair market value. The Commissioner determined that value to be \$6.25 per share for both Class A and Class B shares, a figure approximating the then current over-the-counter price for publicly held Class A shares which were subject to no restrictions or options. Petitioner contended (a) that the shares were received in 1939 when his right to them accrued, and not in 1940 when the certificates representing the shares were issued, and (b) that even if the shares were received in 1940, they had no fair market value at the time of such receipt.

3. PRIOR PROCEEDINGS

On the basis of his determination as aforesaid, the Commissioner of Internal Revenue, on or about February 24, 1944, notified petitioner of a deficiency in his Federal income tax for the calendar year 1940 in the amount of \$99,479.05. Petitioner filed in the Tax Court of the United States his petition for a redetermination of such asserted deficiency; and an answer was filed in due course by the Commissioner of Internal Revenue. The case was tried before a Division of the Tax Court in Los Angeles on November 12 and 13, 1946, after having been consolidated for purposes of hearing and briefing with the case of petitioner's wife, Inez H. Northrop v. Commissioner of Internal Revenue, Tax Court Docket No. 5042, and with the cases of other promoters of Northrop Aircraft, Inc. [238] (and their respective

wives) who had received shares of its stock under similar circumstances.

The Division of the Tax Court held that the shares received by petitioner constituted a realization of income by him in 1940, and that both the Class A and Class B shares so received then had a fair market value of \$4.00 per share. Petitioner moved for a review by the full Tax Court of the findings of fact and opinion of the Division of the Tax Court embodying such holding. Such motion was denied, and on June 18, 1947, a decision was entered to the effect that there was a deficiency in petitioner's income tax for the calendar year 1940 in the amount of \$57,474.19.

4.

The petitioner is aggrieved by the findings of fact and conclusions of law in the findings and opinion of the Tax Court and by its decision entered pursuant thereto, both with respect to the decision that the shares were received by petitioner in 1940 rather than in 1939, and with respect to the decision that both the Class A and Class B shares had a fair market value of \$4.00 per [239] share, or any fair market value, when the certificates therefor were issued in 1940.

MAYNARD J. TOLL,
SIDNEY H. WALL and
GEORGE F. ELMENDORF,

By SIDNEY H. WALL,
Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed Sept. 15, 1947 [240]

[Title U. S. Court of Appeals and Cause No. 6041]

NOTICE OF FILING PETITION FOR
REVIEW

To Commissioner of Internal Revenue and Charles
Oliphant, Chief Counsel, Bureau of Internal
Revenue, Washington, D. C.

You Are Hereby Notified that the petitioner on
the 15th day of September, 1947, filed with the Clerk
of the Tax Court of the United States at Washing-
ton, D. C., a petition for review by the United States
Circuit Court of Appeals for the Ninth Circuit of
the decision of the Tax Court of the United States
heretofore rendered in the above-entitled cause. A
copy of the petition for review as filed is hereto at-
tached and served upon you.

Dated: September 15, 1947.

MAYNARD J. TOLL,
SIDNEY H. WALL, and
GEORGE F. ELMENDORF,
By SIDNEY H. WALL,
Attorneys for Petitioner. [241]

Personal service of the foregoing notice, together
with a copy of the petition for review mentioned
therein, is hereby acknowledged this 19th day of
September, 1947.

COMMISSIONER OF
INTERNAL REVENUE,
By /s/ CHARLES OLIPHANT,
Chief Counsel L.D.K., Bureau of Internal Revenue,
Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Sept. 25, 1947. [242]

In the United States Circuit Court of Appeals
for the Ninth Circuit

T. C. Docket No. 5042

INEZ H. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Now comes Inez H. Northrop, petitioner in this cause, by her attorneys, Maynard J. Toll, Sidney H. Wall and George F. Elmendorf, and petitions for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States rendered on June 18, 1947, determining a deficiency in petitioner's federal income tax for the calendar year 1940 in the amount of \$57,474.19. In support of her petition, petitioner respectfully shows:

1. VENUE

Petitioner on review (hereinafter sometimes called "petitioner") is a resident of the County of Los Angeles, State of California. Petitioner's return of federal income tax for the calendar year 1940, in respect of which the asserted liability arises, was filed with the Collector of [243] Internal Revenue for the Sixth District of California, whose office is located in Los Angeles, California, within the juris-

diction of the Circuit Court of Appeals for the Ninth Circuit.

2. NATURE OF CONTROVERSY

The controversy relates to the proper determination of the petitioner's liability for federal income taxes for the calendar year 1940. The basic questions are (a) whether or not certain stock received by petitioner's husband constituted a realization of income by petitioner (to the extent of petitioner's community one-half thereof) in 1940, and (b) if so, what was the amount thereof.

Petitioner's husband, John K. Northrop, an aeronautical engineer and aircraft designer, was one of the promoters of Northrop Aircraft, Inc. (herein called the "Company"), a California corporation organized in March, 1939, to engage in the business of designing and manufacturing aircraft and aircraft parts. The Company was authorized to issue two classes of stock, known as Class A Common and Class B Common.

On June 17, 1939, a contract was entered into between petitioner's husband and the Company by which the Company agreed, in consideration for the use of his name, his past promotional services and his agreement to be employed by the Company to take charge of engineering and design for [244] five years, to issue to petitioner's husband certain of its Class A and Class B shares on the basis of a specified ratio to the number of its Class A shares which should thereafter be sold to the public.

Pursuant to a permit issued by the California

Corporation Commissioner on June 15, 1939, the Company, from July 21, 1939, to November 28, 1939, sold and issued 250,000 of its Class A shares to underwriters for distribution to the public, receiving \$5 per share therefor. The sale of the 250,000 Class A shares by November 28, 1939, entitled petitioner's husband, under his contract with the Company, to 15,384 Class A shares and 38,461 Class B shares.

The Corporation Commissioner's permit required that all the shares to be issued to petitioner's husband pursuant to his contract should be held in escrow until released by the Commissioner, prohibited sale of any such escrowed shares without the Commissioner's consent, and required certain waivers of the rights of petitioner's husband to receive dividends and to participate in distributions of assets while the shares were held in escrow.

The Company, in June, 1939, designated the escrow holder pursuant to said permit. The Corporation Commissioner's approval of said escrow holder was sought and obtained, and the required waiver of petitioner's husband's rights with respect to dividends and assets was executed and filed, in January, 1940. The certificates representing the [245] Class A and Class B shares in question were issued in the name of petitioner's husband on March 4, 1940, and were forthwith placed in escrow pursuant to the conditions of the permit. They remained in escrow subject to such conditions until October 26, 1942, except that on November 19, 1940, one-third (or 5240) of petitioner's Class A shares were released by order of the Corporation Commissioner.

In addition to the restrictions contained in the Corporation Commissioner's permit, the Class B shares issued to petitioner's husband were, under the Company's articles of incorporation, restricted as to receipt of dividends and as to distribution of assets on liquidation, and were to become void on August 1, 1944, if no adjusted net profits were theretofore earned by the Company; they were to become convertible into Class A shares on or before August 1, 1944, only if specified earnings requirements per Class A share had been met.

Furthermore, 60% of the Class B shares issued to petitioner's husband were, under his contract with the Company, subject to an option in the Company to repurchase at 25 cents per share in certain events.

The Commissioner of Internal Revenue determined that the Class A and Class B shares issued to petitioner's husband were received by him on March 4, 1940, when the certificates representing such shares were issued and placed in escrow, and that they constituted income in that year to [246] petitioner, to the extent of her community one-half thereof, in the amount of their fair market value. The Commissioner determined that value to be \$6.25 per share for both Class A and Class B shares, a figure approximating the then current over-the-counter price for publicly held Class A shares which were subject to no restrictions or options. Petitioner contended (a) that the shares were received in 1939 when petitioner's husband's right to them accrued, and not in 1940 when the certificates representing

the shares were issued, and (b) that even if the shares were received in 1940, they had no fair market value at the time of such receipt.

3. PRIOR PROCEEDINGS

On the basis of his determination as aforesaid, the Commissioner of Internal Revenue, on or about February 24, 1944, notified petitioner of a deficiency in her Federal income tax for the calendar year 1940 in the amount of \$99,479.04. Petitioner filed in the Tax Court of the United States her petition for a redetermination of such asserted deficiency; and an answer was filed in due course by the Commissioner of Internal Revenue. The case was tried before a Division of the Tax Court in Los Angeles on November 12 and 13, 1946, after having been consolidated for purposes of hearing and briefing with the case of petitioner's husband, John K. Northrop v. Commissioner of Internal Revenue, Tax Court Docket No. 5041, and with the cases of other promoters [247] of Northrop Aircraft, Inc. (and their respective wives) who had received shares of its stock under similar circumstances.

The Division of the Tax Court held that the shares received by petitioner's husband constituted a realization of income by petitioner, to the extent of her community one-half thereof, in 1940, and that both the Class A and Class B shares so received then had a fair market value of \$4.00 per share. Petitioner moved for a review by the full Tax Court of the findings of fact and opinion of the Division of the Tax Court embodying such holding. Such mo-

tion was denied, and on June 18, 1947, a decision was entered to the effect that there was a deficiency in petitioner's income tax for the calendar year 1940 in the amount of \$57,474.19.

4.

The petitioner is aggrieved by the findings of fact and conclusions of law in the findings and opinion of the Tax Court and by its decision entered pursuant thereto, both with respect to the decision that the shares were received by petitioner's husband in 1940 rather than in 1939, and with respect to the decision that both the Class A and Class B shares had a fair market value of \$4.00 per share, or any fair market value, when the certificates therefor were issued in 1940.

MAYNARD J. TOLL,
SIDNEY H. WALL, and
GEORGE F. ELMENDORF,

By SIDNEY H. HALL,
Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed Sept. 15, 1947. [248]

[Title U. S. Court of Appeals and Cause No. 5042.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Commissioner of Internal Revenue and Charles
Oliphant, Chief Counsel, Bureau of Internal
Revenue, Washington, D. C.

You Are Hereby Notified that the petitioner on
the 15th day of September, 1947, filed with the

Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated: September 15, 1947.

MAYNARD J. TOLL,
SIDNEY H. WALL, and
GEORGE F. ELMENDORF,

By SIDNEY H. WALL,
Attorneys for Petitioner.

Personal service of the foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 19th day of September, 1947.

COMMISSIONER OF
INTERNAL REVENUE.

By /s/ CHARLES OLIPHANT,
L.D.K.

Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Sept. 25, 1947.

In the Tax Court of the United States

T. C. Docket No. 5041

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS

Petitioner hereby states the following points upon which he intends to rely on review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States rendered in the above-entitled cause on June 18, 1947:

1. The Tax Court erred in holding that income was received by petitioner in the calendar year 1940 by reason of the issuance in that year to petitioner of certificates representing shares of promotional stock of Northrop Aircraft, Inc.

2. The Tax Court erred in determining that all Class A and Class B shares of Northrop Aircraft, Inc., for which certificates were issued to petitioner in 1940 had a fair market value of \$4.00 per share, or any fair market value, at the time of the issuance of such certificates. [251] The Tax Court's holding to that effect is contrary to law, and its

finding to that effect is not supported by substantial or any evidence.

MAYNARD J. TOLL,
SIDNEY H. WALL, and
GEORGE F. ELMENDORF.

By SIDNEY H. WALL,
Attorneys for Petitioner.

(Affidavit of Service by Mail attached.)

[Endorsed]: T.C.U.S. Filed Oct. 20, 1947. [252]

[Title of Tax Court and Cause No. 5042.]

STATEMENT OF POINTS

Petitioner hereby states the following points upon which she intends to rely on review by the United States Circuit Court of Appeals for the Ninth Circuit of decision of the Tax Court of the United States rendered in the above-entitled cause on June 18, 1947:

1. The Tax Court erred in holding that income was received by petitioner in the calendar year 1940 by reason of the issuance in that year to petitioner's husband of certificates representing shares of promotional stock of Northrop Aircraft, Inc.

2. The Tax Court erred in determining that all Class A and Class B shares of Northrop Aircraft, Inc., for which certificates were issued to petitioner's husband in 1940 had a fair market value of \$4.00 per share, or any [254] fair market value, at

the time of the issuance of such certificates. The Tax Court's holding to that effect is contrary to law, and its finding to that effect is not supported by substantial or any evidence.

MAYNARD J. TOLL,
SIDNEY H. WALL, and
GEORGE F. ELMENDORF.

By SIDNEY H. WALL,
Attorneys for Petitioner.

(Affidavit of Service by Mail attached.)

[Endorsed]: T.C.U.S. Filed Oct. 20, 1947. [255]

In the United States Circuit Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 5041-5042

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPLICATION FOR CONSOLIDATION
OF CAUSES

Now comes John K. Northrop, petitioner on review in this cause (hereinafter sometimes called "petitioner"), by his attorneys, O'Melveny & Myers, Maynard J. Toll and Sidney H. Wall, and respectfully makes application for an order of this

Honorable Court consolidating the above-entitled case with the case entitled Inez H. Northrop, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5042, for the purposes of briefing and hearing on review in this Honorable Court. In support of his application, petitioner respectfully shows:

1. On September 15, 1947, petitioner filed with the clerk of the Tax Court of the United States his petition for review by this Honorable Court of the decision of the Tax Court of the United States rendered in the above-entitled case on June 18, 1947, determining a deficiency [257] in petitioner's Federal income tax for the calendar year 1940 in the amount of \$57,474.19. A copy of said petition for review, together with notice thereof, was served upon the respondent herein, the Commissioner of Internal Revenue, by registered mail on September 16, 1947.

2. On said date of September 15, 1947, petitioner's wife, Inez H. Northrop, likewise filed with the clerk of the Tax Court of the United States her petition for review by this Honorable Court of the decision of the Tax Court of the United States rendered on June 18, 1947, in the case entitled Inez H. Northrop, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5042, determining a deficiency in the Federal income tax of said Inez H. Northrop for the calendar year 1940 in the amount of \$57,474.19. A copy of said petition for review, together with notice thereof, was likewise served upon the respondent herein, the

Commissioner of Internal Revenue, by registered mail on September 16, 1947.

3. The aforesaid cases of petitioner herein and of his wife, Inez H. Northrop, involve identical questions of law and are based upon identical facts. The basic questions in both said cases are (a) whether or not certain stock received by petitioner herein constituted a realization of income by petitioner and his wife, Inez H. Northrop, in 1940 (each to the extent of one-half thereof as his or her community property); and (b) if so, [258] what was the amount of such income. Said two cases of petitioner herein and of his said wife, Inez H. Northrop, were consolidated for purposes of hearing and briefing before the Tax Court of the United States, together with six other cases involving similar facts and similar questions of law.* The cases of petitioner herein and of his said wife, Inez H. Northrop,

*The other six cases mentioned are: Lamotte T. Cohu, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5039; Didi M. Cohu, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5040; Gage H. Irving, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5043; Eleanor Salisbury Irving, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5044; Edward A. Bellande and Molly LaMont Bellande, Petitioners, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5045; and Moye W. Stephens and Inez B. Stephens, Petitioners, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5046.

together with the other six cases referred to above, were heard and decided in the Tax Court on the basis of a single stipulation of facts and of certain oral testimony introduced on behalf of all petitioners. No review of the decisions of the Tax Court of the United States in said six other cases is being sought by the petitioners therein.

4. By reason of the foregoing circumstances, petitioner believes that the time of this Honorable Court will be conserved by consolidation of this case with that of petitioner's wife, Inez H. Northrop, for purposes of briefing and hearing on review in this Court on the basis of a single consolidated record on review, and that such [259] consolidation will be to the best interests of all parties concerned.

5. A similar application for consolidation of this case and that of petitioner's wife, Inez H. Northrop, is being filed concurrently herewith by said Inez H. Northrop in said case entitled *Inez H. Northrop, Petitioner, v. Commissioner of Internal Revenue, Respondent*, Tax Court Docket No. 5042.

Wherefore, petitioner prays that this Honorable Court enter its order that this case be consolidated with the case entitled *Inez H. Northrop, Petitioner, v. Commissioner of Internal Revenue, Respondent*, Tax Court Docket No. 5042, for purposes of briefing and hearing on review in this Honorable Court on the basis of a single consolidated record on review, and that the clerk of the Tax Court of the United States be directed to prepare and transmit

to this Court a single consolidated record on review in said two cases.

Respectfully submitted,

O'MELVENY & MYERS,
MAYNARD J. TOLL, and
SIDNEY H. WALL.

By /s/ SIDNEY H. WALL,
Attorneys for Petitioner.

So Ordered:

WILLIAM DENMAN,
Acting Senior United States
Circuit Judge.

Attest: Sept. 23, 1947.

A true copy.

/s/ PAUL P. O'BRIEN.
Clerk.

[Endorsed]: Filed Sept. 23, 1947. Paul P. O'Brien,
Clerk.

State of California,
County of Los Angeles—ss.

Harley Walther, being first duly sworn, deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 900 Title Insurance Building, 433 South Spring Street, Los Angeles 13, California;

That on September 20, 1947, affiant served the within Application for Consolidation of Causes

upon counsel named below by depositing a true copy thereof in a United States mail box at Los Angeles, California, in a sealed envelope, registered, with postage thereon fully prepaid and addressed as follows: Charles Oliphant, Esq., Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

That there is a regular communication by mail between the place of mailing and the place so addressed.

HARLEY WALTHER.

Subscribed and sworn to before me this 20th day of September, 1947.

[Seal] AGNES E. SHULTZ,
Notary Public in and for said County and State.

[Endorsed]: T.C.U.S. Sept. 29, 1948. [261]

[Title of U. S. Court of Appeals and Cause.]

APPLICATION FOR TRANSMITTAL OF
ORIGINAL EXHIBITS FROM
TAX COURT

Now comes John K. Northrop, petitioner on review in this cause (hereinafter sometimes called "petitioner"), by his attorneys, O'Melveny & Myers, Maynard J. Toll and Sidney H. Wall, and respectfully makes application to this Honorable Court for an order that, upon designation of the contents of the record on review herein, the original exhibits on file with the Tax Court of the United States in this case be transmitted by the clerk of the Tax Court to this Honorable Court for its inspection. In support of his application, petitioner respectfully shows:

1. On September 15, 1947, petitioner filed with the clerk of the Tax Court of the United States his petition for review by this Honorable Court of the decision of the Tax Court of the United States rendered in this case on June 18, 1947, determining a deficiency in petitioner's Federal income tax for the calendar year 1940 in the amount of \$57,174.19. A copy of said petition for review, together with notice thereof, was served upon the respondent herein, the Commissioner of Internal Revenue, by registered mail on September 16, 1947.

2. Concurrently herewith, petitioner has filed in this Honorable Court his application for consolidation of this case with the case entitled Inez H. Northrop, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5042, for purposes of briefing and hearing on review in this Court, and for an order directing the clerk of the Tax Court of the United States to prepare and transmit to this Court a single consolidated record on review in said two cases.

3. There are twenty-nine (29) exhibits on file with the Tax Court of the United States in connection with this case. Certain of said exhibits are in the form of printed documents, or photostatic copies of printed documents, consisting of the following:

A 16-page prospectus issued in connection with the offering for sale of certain stock (Exhibit 1-A);

The articles of incorporation of Northrop [263] Aircraft, Inc. (Exhibit 2-B);

Certain contracts between Northrop Aircraft, Inc., and John K. Northrop and other promoters of that corporation (Exhibits 3-C, 4-D, 5-E, 6-F, 7-G and 8-H);

Certain ledger accounts (Exhibit 20-W); and

Two 13-page annual reports to the stockholders of Northrop Aircraft, Inc., including financial statements and charts (Exhibits BB and CC).

The remaining exhibits consist of typewritten copies of the following material:

Various compilations of figures and financial statements (Exhibits 9-I, 18-S, T, 19-U and V):

Certain rules and regulations of the California Division of Corporations (Exhibit 10-J);

Certain corporate resolutions (Exhibit 11-K);

A certain agreement (Exhibit 16-P):

Applications to the California Commissioner of Corporations (Exhibits R and 21-X);

A decision of the California Commissioner of Corporations (Exhibit 24-AA); and

Various letters (Exhibits 12-L, 13-M, 14-N, 15-O, 17-Q, 22-Y and 23-Z).

4. If the original exhibits on file in the Tax [264] Court of the United States are permitted to be transmitted to this Court for inspection as a part of the record on review in this case, the expense to petitioner of having a typewritten copy of the record on review prepared by the Clerk of the Tax Court of the United States will be materially reduced; and petitioner believes that the transmission to this Court, for its inspection, of the original ex-

hibits on file with the Tax Court, particularly in the case of the exhibits which are in the form of printed documents or photostatic copies of printed documents, will better serve the convenience of this Court than would the transmission of typewritten copies thereof prepared by the clerk of the Tax Court.

5. A similar application for permission to transmit original exhibits is being filed concurrently herewith by petitioner's wife, Inez H. Northrop, in the case entitled Inez H. Northrop, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5042.

Wherefore, petitioner prays that this Honorable Court enter its order directing the clerk of the Tax Court, upon designation of the contents of the record on review herein,

(a) to transmit all the original exhibits in this case to this Court for its inspection as a part of the record on review in this case, or as a part of [265] the consolidated record on review in this case and in the case of Inez H. Northrop, Petitioner, v. Commissioner of Internal Revenue, Respondent, Tax Court Docket No. 5042, in the event that the petitions for consolidation filed herein and in said case shall be granted, or

(b) in the alternative and in the event that this Court shall determine that all the original exhibits on file in the Tax Court should not be so transmitted, then to transmit to this Court for its inspection as a part of the record on review herein as aforesaid the originals on file with the Tax Court

of Exhibits 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 20-W, BB and CC, being the exhibits in the form of printed documents or photostatic copies of printed documents hereinabove referred to.

Respectfully submitted,

O'MELVENY & MYERS,
MAYNARD J. TOLL, and
SIDNEY H. WALL.

By SIDNEY H. WALL,
Attorneys for Plaintiff.

Ordered application granted in accordance with prayer of Subdivision (a) of the foregoing application.

WILLIAM DENMAN,
United States Circuit Judge.

A true copy.

Attest: Sept. 23, 1947, Paul P. O'Brien, Clerk.

[Endorsed]: Filed September 23, 1947. Paul P. O'Brien, Clerk. [266]

State of California,
County of Los Angeles—ss.

Harley Walther, being first duly sworn, deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 900 Title Insurance Building, 433 South Spring Street, Los Angeles 13, California;

That on September 20, 1947, affiant served the within Application for Transmittal of Original Exhibits from Tax Court upon counsel named below by depositing a true copy thereof in a United States mail box at Los Angeles, California, in a sealed envelope, registered, with postage thereon fully prepaid and addressed as follows: Charles Oliphant, Esq., Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

That there is a regular communication by mail between the place of mailing and the place so addressed.

HARLEY WALTHER.

Subscribed and sworn to before me this 20th day of September, 1947.

(Seal) AGNES E. SHULTZ,
Notary Public in and for Said County and State.

[Endorsed]: T.C.U.S. Filed Sept. 29, 1947. [267]

In the Tax Court of the United States

T. C. Docket No. 5041

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review heretofore filed by the petitioner:

1. The docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court, as follows:
(a) Petition, (b) Answer.

3. The findings of fact and opinion of the Tax Court.

4. The motion for review by the full Tax Court.

5. The decision of the Tax Court. [268]

6. The stipulation of facts, together with all exhibits attached thereto, as well as Exhibits BB and CC on file.

7. From the official transcript of oral testimony,

pages 4 and 5, containing the consolidation of this case and others for hearing in the Tax Court, pages 27 to 30, inclusive, containing petitioner's objections to certain evidence, the testimony of Mr. Claude M. Monson appearing on pages 30 to 79, inclusive, the testimony of Mr. Carl L. Barnes, appearing on pages 80 to 86, inclusive; the testimony of Mr. B. P. Lester, appearing on pages 88 to 137, inclusive; the testimony of Mr. Henry M. Bateman appearing on pages 138 to 159, inclusive, and the testimony of Mr. Justus A. Hahn, appearing on pages 163 to 165, inclusive.

8. The petition for review filed on September 15, 1947.

9. The notice of filing of petition for review.

10. This designation of contents of record on review.

11. The statement of points filed herewith.

Two copies of all the portions of said official transcript designated in item 7 above are filed herewith.

The above-entitled cause having been consolidated for hearing in the Tax Court with the case entitled *Inez H. Northrop v. Commissioner of Internal Revenue*, Docket No. [269] 5042, and with six other cases (Docket Nos. 5039, 5040, 5043, 5044, 5045 and 5046), and the United States Circuit Court of Appeals for the Ninth Circuit having granted petitioner's application for consolidation of the above-entitled cause with said case of *Inez H. Northrop*, Docket No. 5042, for purposes of briefing and hearing on review on the basis of a single consolidated

record on review, you will please prepare and transmit a single consolidated record on review in said two cases in which items 3, 4, 6 and 7 referred to in the preceding paragraph are not duplicated.

Said United States Circuit Court of Appeals for the Ninth Circuit having granted petitioner's application for transmission of all original exhibits in this case to said Circuit Court of Appeals for its inspection as a part of the consolidated record on review in said two cases mentioned above, you will please transmit all said original exhibits in compliance with the directions of said Circuit Court of Appeals.

MAYNARD J. TOLL,
SIDNEY H. WALL, and
GEORGE F. ELMENDORF.

By SIDNEY H. WALL,
Attorneys for Petitioner.

(Affidavit of Service by Mail attached.)

[Endorsed]: T.C.U.S. Filed Oct. 20, 1947. [270]

[Title of Tax Court and Cause No. 5042.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review heretofore filed by the petitioner:

1. The docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court, as follows: (a) Petition; (b) Answer.

3. The findings of fact and opinion of the Tax Court.

4. The motion for review by the full Tax Court.

5. The decision of the Tax Court. [272]

6. The stipulation of facts, together with all exhibits attached thereto, as well as Exhibits BB and CC on file.

7. From the official transcript of oral testimony, pages 4 and 5, containing the consolidation of this case and others for hearing in the Tax Court; pages 27 to 30, inclusive, containing petitioner's objections to certain evidence; the testimony of Mr. Claude M. Monson, appearing on pages 30 to 79, inclusive; the testimony of Mr. Carl L. Barnes appearing on pages 80 to 86, inclusive; the testimony of Mr. B. P. Lester, appearing on pages 88 to 137, inclusive; the testimony of Mr. Henry M. Bateman, appearing on pages 138 to 159, inclusive, and the testimony of Mr. Justus A. Hahn, appearing on pages 163 to 165, inclusive.

8. The petition for review filed on September 15, 1947.

9. The notice of filing of petition for review.

10. This designation of contents of record on review.

11. The statement of points filed herewith.

Two copies of all the portions of said official transcript designated in item 7 above are filed herewith.

The above-entitled cause having been consolidated for hearing in the Tax Court with the case entitled *John K. Northrop v. Commissioner of Internal Revenue*, Docket No. [273] 5041, and with six other cases (Docket Nos. 5039, 5040, 5043, 5044, 5045 and 5046), and the United States Circuit Court of Appeals for the Ninth Circuit having granted petitioner's application for consolidation of the above-entitled cause with said case of *John K. Northrop*, Docket No. 5041, for purposes of briefing and hearing on review on the basis of a single consolidated record on review, you will please prepare and transmit a single consolidated record on review in said two cases in which items 3, 4, 6 and 7 referred to in the preceding paragraph are not duplicated.

Said United States Circuit Court of Appeals for the Ninth Circuit having granted petitioner's application for transmission of all original exhibits in this case to said Circuit Court of Appeals for its inspection as a part of the consolidated record on review in said two cases mentioned above, you will please transmit all said original exhibits in compliance with the directions of said Circuit Court of Appeals.

MAYNARD J. TOLL,
SIDNEY H. WALL, and
GEORGE F. ELMENDORF,

By SIDNEY H. WALL,
Attorneys for Petitioner.

(Affidavit of Service by Mail attached.)

[Endorsed]: T.C.U.S. Filed Oct. 20, 1947. [274]

[Title of Tax Court and Cause Nos. 5041-42.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 275, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 2nd day of November, 1947.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 11787. United States Circuit Court of Appeals for the Ninth Circuit. John K. Northrop, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and Inez H. Northrop, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petitions to Review Decisions of The Tax Court of the United States.

Filed November 15, 1947.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 5041

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 5042

INEZ H. NORTHROP,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPLICATION FOR EXTENSION OF TIME
FOR TRANSMITTING RECORD ON
REVIEW

John K. Northrop and Inez H. Northrop, petitioners on review in the above-entitled causes (hereinafter sometimes called "Petitioners"), by their attorneys O'Melveny & Myers, Maynard J. Toll and Sidney H. Wall, respectfully make application to this Honorable Court for an extension of the time for transmission of the record on review in the above-entitled causes by the clerk of the Tax Court of the United States to the clerk of this Honorable Court for a period of thirty (30) days from and after October 25, 1947. In support of their application, Petitioners respectfully show:

1. On September 15, 1947, Petitioners and each of them filed with the clerk of the Tax Court of the United States their separate petitions for review by this Honorable Court of the decision of the Tax Court rendered in the above-entitled cases on June 18, 1947, determining deficiencies in Petitioners' Federal income taxes for the calendar year 1940. A copy of each of said petitions for review, together with notice thereof was served upon the respondent the Commissioner of Internal Revenue by registered mail on September 16, 1947.

2. On September 23, 1947, pursuant to applications therefor filed by Petitioners, this Honorable Court entered its order that the two above-entitled cases be consolidated for purposes of briefing and hearing on review in this Honorable Court on the basis of a single consolidated record on review, and that the clerk of the Tax Court of the United States be directed to prepare and transmit to this Court a single consolidated record on review in said two cases.

3. The grounds upon which this application for extension of time for transmitting record on review is bases are set forth in the affidavit of Sidney H. Wall attached hereto marked Exhibit A and by this reference made a part hereof as if herein set out in full.

Wherefore, Petitioner pray that the time for transmission of the record on review in the above-entitled cases by the clerk of the Tax Court of the United States to the clerk of this Honorable Court

be extended for a period of thirty (30) days from and after October 25, 1947.

Respectfully submitted,

O'MELVENY & MYERS,
MAYNARD J. TOLL and
SIDNEY H. WALL,
By SIDNEY H. WALL,
Attorneys for Petitioners.

So Ordered:

WILLIAM DENMAN,
Acting Senior United States Circuit Judge.

October 25, 1947.

[Endorsed]: Filed Oct. 25, 1947. Paul P. O'Brien,
Clerk.

A True Copy. Attest: Oct. 25, 1947.

(Seal) /s/ PAUL P. O'BRIEN,
Clerk.

[Title of U. S. Court of Appeals and Causes.]

STATEMENT OF POINTS

Petitioners on review in the above-entitled cases (hereinafter sometimes called "Petitioners'") hereby state the following points upon which they intend to rely on review by the above-entitled Court of the decisions of the Tax Court of the United States rendered in the above-entitled cases on June 18, 1947:

1. The Tax Court erred in holding that income

was received by Petitioners, or either of them, in the calendar year 1940 by reason of the issuance in that year to Petitioner John K. Northrop of certificates representing shares of promotional stock of Northrop Aircraft, Inc., a corporation. The Tax Court's holding to that effect is contrary to law, and its finding to that effect is not supported by substantial or any evidence.

2. The Tax Court erred in determining that the Class A and Class B shares of Northrop Aircraft, Inc., for which certificates were issued to Petitioner John K. Northrop in 1940 had a fair market value of \$4.00 per share, or any fair market value, at the time of the issuance of such certificates. The Tax Court's holding to that effect is contrary to law, and its finding to that effect is not supported by substantial or any evidence.

O'MELVENY & MYERS,
MAYNARD J. TOLL and
SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,
Attorneys for Petitioners.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed November 24, 1947. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

DESIGNATION OF RECORD ON REVIEW

To The Honorable Paul P. O'Brien, Clerk of the
United States Circuit Court of Appeals for the
Ninth Circuit.

Petitioners on review in the above-entitled cases hereby designate the following portions of the record in said cases heretofore certified by the clerk of the Tax Court of the United States, which said Petitioners consider necessary for the consideration of their Petitions for Review of the decisions of the Tax Court of the United States rendered in the above-entitled cases:

1. Docket entries of all proceedings before the Tax Court in T.C. Docket No. 5041 (Cert. Rec. p. 1).*
2. Docket entries of all proceedings before the Tax Court in T.C. Docket No. 5042 (Cert. Rec. p. 3).
3. Petition in T.C. Docket No. 5041 (Cert. Rec. p. 5).
4. Answer in T.C. Docket No. 5041 (Cert. Rec. p. 17).
5. Petition in T.C. Docket No. 5042 (Cert. Rec. p. 19).
6. Answer in T.C. Docket No. 5042 (Cert. Rec. p. 31).

* Page references are to the certified record heretofore transmitted by the clerk of the Tax Court of the United States.

7. Findings of Fact and Opinion of the Tax Court (both dockets) (Cert. Rec. p. 33).

8. Motion for Review by the full Tax Court (both dockets) (Cert. Rec. p. 55).

9. Decision of the Tax Court in T.C. Docket No. 5041 (Cert. Rec. p. 65).

10. Decision of the Tax Court in T.C. Docket No. 5042 (Cert. Rec. p. 66).

11. Stipulation of Facts (both dockets) (Cert. Rec. p. 67), together with Exhibits 1-A to 17-Q, inclusive, R, 18-S, T, 19-U, V, 20-W to 23-Z, inclusive, and 24-AA, all of which are attached to said Stipulation of Facts, as well as Exhibits BB and CC (all of which original exhibits were transmitted by the clerk of the Tax Court in compliance with an order of the United States Circuit Court of Appeals for the Ninth Circuit).

12. Excerpts from official transcript of oral testimony (both dockets) (Cert. Rec. p. 88) as follows: pages 4 and 5 of said official transcript, pages 27 to 30 thereof, inclusive, the testimony of Mr. Claude M. Monson appearing on pages 30 to 79 thereof, inclusive, the testimony of Mr. Carl L. Barnes appearing on pages 80 to 86 thereof, inclusive, the testimony of Mr. B. P. Lester appearing on pages 88 to 137 thereof, inclusive, the testimony of Mr. Henry M. Bateman appearing on pages 138 to 159 thereof, inclusive, and the testimony of Mr. Justus A. Hahn appearing on pages 163 to 165 thereof, inclusive.

13. Petition for Review and Notice of Filing thereof with Proof of Service in T.C. Docket No. 5041 (Cert. Rec. p. 234).

14. Petition for Review and Notice of Filing thereof with Proof of Service in T.C. Docket No. 5042 (Cert. Rec. p. 243).

15. Statement of Points in T.C. Docket No. 5041 (Cert. Rec. p. 251).

16. Statement of Points in T.C. Docket No. 5042 (Cert. Rec. p. 254).

17. Application and Order for Consolidation of Causes (both dockets) (Cert. Rec. p. 257).

18. Application and Order for Transmittal of Original Exhibits (both dockets) (Cert. Rec. p. 262).

19. Designation of Contents of Record on Review in T.C. Docket No. 5041 (Cert. Rec. p. 268).

20. Designation of Contents of Record on Review in T.C. Docket No. 5042 (Cert. Rec. p. 272).

21. Application and Order of this Court for extension of time for transmitting record on review (not included in record certified by clerk of the Tax Court).

22. This Designation of Record on Review.

23. The Statement of Points filed herewith.

O'MELVENY & MYERS,
MAYNARD J. TOLL and
SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,

Attorneys for Petitioners.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed November 24, 1947. Paul P. O'Brien, Clerk.

At a Stated Term, to wit: The October Term, 1948, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the fourth day of January, in the year of our Lord one thousand nine hundred and forty-nine.

Present: Honorable William Healy, Circuit Judge, Presiding, Honorable Homer T. Bone, Circuit Judge, Honorable William E. Orr, Circuit Judge.

[Title of Cause.]

ORDER GRANTING APPLICATION FOR
CONSIDERATION OF ORIGINAL
EXHIBITS

Upon consideration of the application of the petitioners that the original exhibits transmitted to this Court by the clerk of the Tax Court of the United States be considered by this Court in their original form without printing, and good cause therefor appearing, It Is Ordered that such application be, and hereby is granted.

No. 11787.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

INEZ H. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

O'MELVENY & MYERS,

MAYNARD J. TOLL,

SIDNEY H. WALL and

GEORGE F. ELMENDORF,

900 Title Insurance Building, Los Angeles 13,

Attorneys for Petitioners.

JUL 2 1948

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No. 11787.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN K. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

INEZ H. NORTHROP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

Jurisdiction

Pursuant to the provisions of Sections 272 and 1101 of the Internal Revenue Code (26 U. S. C. A., §272 and §1101) relating to the jurisdiction of The Tax Court of the United States, each of the petitioners above named filed in said Court on May 22, 1944, a petition [R. 5, 18]¹ for redetermination of a deficiency in income taxes for

¹The abbreviation "R." is used in this brief to refer to the printed Transcript of Record on file herein.

the calendar year 1940 which had theretofore been asserted by respondent Commissioner of Internal Revenue. After answers [R. 16, 30] were filed by respondent, these two cases (together with six other cases involving similar questions) were consolidated for purposes of hearing and briefing in The Tax Court. [Docket entry, R. 2.] A hearing was had on November 12 and 13, 1946, before the Honorable Samuel B. Hill, Judge of The Tax Court, who promulgated his findings of fact and opinion on April 9, 1947. [R. 2, 31-56.] Petitioners' motion for review by the full Tax Court [R. 57-63], filed May 5, 1947, was denied May 8, 1947 [R. 3]; and decisions were entered June 18, 1947, determining a deficiency in income tax for the year 1940 with respect to each petitioner in the amount of \$57,474.19. [R. 3, 64, 65.]

Petitioners, being aggrieved thereby, filed with this Honorable Court on September 15, 1947, their petitions for review of said Tax Court decisions. [R. 199, 206.] This Court has jurisdiction to review such decisions pursuant to Section 1141 of the Internal Revenue Code (26 U. S. C. A., §1141); and the venue is properly laid in the Ninth Circuit by reason of the fact that petitioners' returns of federal income tax for the calendar year 1940, in respect of which the asserted liability here in question arises, were filed with the Collector of Internal Revenue for the Sixth District of California. [Stipulation of Facts, para. 4; R. 67.]

Pursuant to petitioners' application therefore, this Honorable Court on September 23, 1947, entered its order that these two cases be consolidated for purposes of briefing and hearing on the basis of a single consolidated record on review. [R. 215, 219.]

Statement of the Case.

The controversy relates to the proper determination of the federal income tax liability of petitioners, husband and wife, for the calendar year 1940. The basic questions are (1) whether the income, if any, resulting from the receipt by petitioners of certain stock of Northrop Aircraft, Inc. (herein sometimes called the "Company") was realized by them in 1939 (as petitioners contend) or in 1940 (as The Tax Court held), and (2) if income was thereby realized in 1940, what was the amount of such income.

There is no substantial dispute as to the basic facts, except with respect to the ultimate fact of fair market value of the stock.

Petitioner John K. Northrop, an aeronautical engineer and aircraft designer, was one of the organizers of the Company, Northrop Aircraft, Inc., a California corporation organized in March, 1939, to engage in the business of designing and manufacturing aircraft and aircraft parts. [Findings, R. 33.] The Company was authorized to issue two classes of stock, known as Class A Common and Class B Common. [Findings, R. 33-34.]

On June 17, 1939, and prior to issuance of any of the Company's stock, a contract [Ex. 3-C]² was entered into between petitioner John K. Northrop and the Company by which the Company agreed, in consideration for the use of Northrop's name, his past promotional services, and his agreement to be employed by the Company to take

²On January 4, 1949, this Honorable Court made its order granting petitioners' application that the original exhibits, theretofore transmitted to this Court pursuant to order of September 23, 1947 [R. 224], be considered by this Court in their original form without printing [R. 239].

charge of engineering and design for a period of five years at an annual salary of \$9,000, to issue to him certain of its Class A and Class B shares on the basis of specified ratios to the number of its Class A shares which should thereafter be sold to the public. He was to receive one Class A share for every 16.25 such shares sold to the public and one Class B share for every 6.5 Class A shares sold to the public. [Findings, R. 34-35.]

That contract provided that as of the date the Company first received cash proceeds from the sale of its shares, and thereafter if and as the Company should issue shares for money or other specified considerations, the Company would issue Class A and B shares to Northrop according to the above ratios. It further provided that Northrop's "right to shares hereunder shall be deemed to have accrued as of the date of the sale of the shares which shall have determined his right thereto * * * notwithstanding the date of actual issuance thereof to" Northrop. [Findings, R. 34-35; Ex. 3-C.]

On June 15, 1939, the California Commissioner of Corporations (herein sometimes called "Corporation Commissioner") issued a permit to the Company to sell and issue its securities [Findings, R. 36; Ex. 1-A, p. 13]; and on June 17, 1939, the Company entered into an underwriting agreement with certain underwriters for the sale of its Class A shares to the public. [Findings, R. 43.] The Company first received cash proceeds from the sale of its shares to the underwriters on July 21, 1939 [Findings, R. 44], and between that date and November 28, 1939, a total of 250,000 of its Class A shares were sold and issued to the underwriters for a cash price of \$5 per share. [Findings, R. 45.] The underwriting agreement had originally contemplated the sale of 400,000 Class A

shares to the public, but difficulties encountered in marketing the stock led to a reduction to 250,000 in the number of shares to be sold and a corresponding reduction from \$2,000,000 to \$1,250,000 in the cash available for the commencement of the Company's business. [Findings, R. 44-45.]

Pursuant to his contract with the Company and by virtue of the sale by the Company for cash of the 250,000 Class A shares during the period July 21, 1939, to November 28, 1939, petitioner John K. Northrop became entitled, not later than November 28, 1939, to receive 15,384 Class A shares and 38,461 Class B shares.

The Corporation Commissioner's permit (1) required that all certificates evidencing shares to be issued to Northrop pursuant to his contract should be held in escrow, until released by the Commissioner, with an escrow holder selected by the Company and approved by the Commissioner, (2) prohibited sale or transfer of any such escrowed shares without the Commissioner's consent, and (3) required, as a condition to issuance of such shares, that Northrop execute a waiver of any right to dividends on such shares while held in escrow and a waiver of any right to participate in any distribution of assets of the Company on account thereof until all stockholders who had paid cash or its equivalent for their shares should have received the full amount of the issuance price. [Findings, R. 36-38; Ex. 1-A, p. 13.]

In June, 1939, the Company designated Bank of America National Trust and Savings Association as escrow holder pursuant to said permit. [Stipulation of Facts, para. 26, R. 71-72; Ex. 11-K.] All that then remained to be done in order fully to comply with the conditions of the permit was (1) to secure the Commission-

er's approval of the escrow holder, and (2) to execute and file the waivers as to dividends and distributions of assets. The Corporation Commissioner's approval of the designated bank as escrow holder was sought by the Company on January 22, 1940, and such approval was given on January 25, 1940. [Findings, R. 38; Stipulation of Facts, paras. 32 and 33, R. 73.] And the required waiver of Northrop's rights with respect to dividends and distributions of assets was dated as of November 30, 1939, was executed January 4, 1940, and was filed with the Corporation Commissioner on January 22, 1940. [Findings, R. 38.]

The certificates evidencing title to the 15,384 Class A shares and the 38,461 Class B shares to which petitioner John K. Northrop had become entitled pursuant to his contract of June 17, 1939, were issued in his name on March 4, 1940, and were forthwith placed in escrow pursuant to the conditions of the permit. [Findings, R. 38-39.] Approximately one-third (5,240) of petitioners' Class A shares were released from escrow by order of the Corporation Commissioner on November 19, 1940. The remaining two-thirds of petitioners' Class A shares and all their Class B shares remained in escrow subject to the aforesaid conditions for more than two and one-half years, or until October 26, 1942. [Findings, R. 41.]

At the time of making the contract with Northrop on June 17, 1939, the Company had also entered into similar contracts with five other men who, like Northrop, had participated in its organization. [Findings, R. 33, 34.] Of this group of six individuals, five (Messrs. Northrop, Cohu, Irving, Bellande and Stephens) had had broad experience in the aircraft industry and were expected to and did take an active part in the management and operation

of the Company. [Stipulation of Facts, paras. 9-13, R. 68-69; testimony of B. P. Lester, R. 144-146.] The sixth, T. T. Ellsworth, was a bond salesman who had no aircraft industry experience and who was not expected to be active in the Company. [Testimony of B. P. Lester, R. 150.] Ellsworth's contract with the Company contained no employment agreement and it provided for the issuance to him of Class A and Class B shares on a much smaller ratio to the number of Class A shares sold to the public. [Findings, R. 34-35.] The aforesaid conditions of the Corporation Commissioner's permit likewise applied to the shares to be issued to the other organizers.

The completion of the sale by the Company of 250,000 Class A shares on November 28, 1939, noted above, entitled Ellsworth under his contract to receive 1,538 Class A shares and 2,307 Class B shares. On the same day, November 28, 1939, in a transaction resulting from personal solicitation and negotiation over a period of ninety days with a party particularly interested in Southern California aviation stocks, Ellsworth assigned his contract with the Company to one A. H. Smith in exchange for 2,500 shares of Duval Texas Sulphur Co. (600 of which Ellsworth immediately sold at $7\frac{1}{8}$, and 300 of which, or approximately 12%, were retained as profit by the intermediary negotiating the deal). [Testimony of Carl L. Barnes, R. 129-132; Findings, R. 39.]

No other sale or exchange of any of the escrowed stock occurred at any time prior to the termination of the escrow.

Under the contract of June 17, 1939, between the Company and petitioner John K. Northrop, the Company was granted an option to purchase 60% (or 23,077) of the Class B shares to be issued to Northrop thereunder at the

cash price of 25 cents per share in the event of (a) Northrop's death, or (b) termination of his employment contract by reason of his default. All these Class B shares were to remain subject to the option until August 1, 1941, after which the shares were to be gradually released from the option over the succeeding 3-year period. No such option existed with respect to the shares to which Ellsworth became entitled under his contract. [Findings, R. 35-36.]

In addition to the contract option and the restrictions contained in the Corporation Commissioner's permit, the 38,461 Class B shares received by petitioners were subject to further limitations and conversion rights under the Company's Articles of Incorporation [Ex. 2-B, Article Five], as follows [Findings, R. 41-42]:

(a) Class B shares were not entitled to participate in dividends prior to July 1, 1942, and were to be entitled to dividends thereafter only if specified earnings requirements per Class A share had been met.

(b) Class B shares were not entitled to participate in any distribution of assets on liquidation, dissolution or winding up until the holders of all outstanding Class A shares should have received an amount equal to the consideration received by the Company upon the original issuance thereof.

(c) The Class B shares were to become void if no "adjusted net profits," as defined in the Articles, were earned by the Company during the 5-year period commencing August 1, 1939, or during the 3-year period commencing August 1, 1941.

(d) Class B shares were to become convertible, share for share, into Class A shares on August 1,

1944, if “adjusted net profits” had then amounted to fifty cents per Class A share per annum for the preceding 5-year period; or, if such earnings amounted to less than fifty cents per annum, then the Class B shares were to be convertible into a proportionately smaller number of Class A shares. Further, Class B shares were to become convertible, share for share, into Class A shares if at any time prior to August 1, 1944, the “adjusted net profits,” computed either from August 1, 1939, or from August 1, 1941, amounted in total to \$1,000,000.

None of the Class B shares became convertible prior to August 1, 1942, but on that date all Class B shares became convertible, share for share, into Class A shares. [Findings, R. 42-43.]

As mentioned above, difficulties were encountered in selling the Company’s Class A shares to the public in 1939, necessitating retrenchment in the plans for financing the Company. On March 4, 1940, the date of issuance of the certificates evidencing title to petitioners’ shares, the Company was new and untried; its factory had just been completed; it faced substantial competition from established aircraft manufacturers having operating plant facilities and proved products on the market; it had no earnings and had paid no dividends, and it had only one order on its books for approximately \$760,000. [Findings, R. 44-47.] And by that date it was known that that single order, which had been accepted at an estimated “break-even” price, would result in a loss to the Company. [Testimony of Claude M. Monson, R. 93.]

The Company suffered sizeable net losses in the fiscal years ending July 31, 1940, and July 31, 1941. It first showed earnings in the fiscal year ending July 31, 1942,

and it paid dividends on its stock for the first time in November, 1943. [Findings, R. 47.]

The unrestricted Class A shares of the Company which were sold to the public were never traded or listed on any securities exchange during 1939 or 1940, but were traded on an over-the-counter basis through securities dealers. These unrestricted Class A shares were traded in relatively small blocks of 100 or less, at prices ranging from a low of 5 to a high of $6\frac{7}{8}$ during the period from November 9, 1939, to March 8, 1940. [Findings, R. 47-48.]

The respondent Commissioner of Internal Revenue determined that the Class A and Class B shares issued to petitioners as aforesaid were received by them in 1940, when the certificates representing such shares were issued, and that they constituted income in that year in the amount of their fair market value. Despite the highly restricted nature of petitioners' shares, respondent determined that value to be \$6.25 per share for both Class A and Class B shares, a figure approximating the then current over-the-counter price for publicly held Class A shares which were subject to no restrictions or options. On this basis, respondent determined deficiencies in 1940 income tax in the amounts of \$99,479.05 for John K. and \$99,479.04 for Inez H. Northrop.

The Tax Court held that petitioners realized income by virtue of the promotional shares in 1940 as determined by respondent rather than in 1939 as contended by petitioners [Opinion, R. 50-53], but that respondent's valuation of \$6.25 per share failed to give sufficient recognition to the restrictions imposed on the promotional shares. The Tax Court found that both the Class A and Class B shares received by petitioners had the same fair market value, to wit: \$4.00 per share [Findings, R. 49; Opinion, R.

53-56], and on this basis determined a deficiency in 1940 income tax against each of petitioners in the amount of \$57,474.19. [Decisions, R. 64-65.] Thereupon, petitioners filed their petitions for review of such decisions by this Court. [R. 199, 206.]

SPECIFICATION OF ERRORS.

1. The Tax Court erred in deciding that income was received by petitioners, or either of them, in the calendar year 1940 by reason of the issuance in that year to petitioner John K. Northrop of certificates representing 15,384 Class A shares and 38,461 Class B shares of promotional stock of Northrop Aircraft, Inc., a corporation. The Tax Court's holding to that effect, on the basis of uncontroverted evidence, is contrary to law.

2. The Tax Court erred in finding as a fact [R. 49] and in determining that each of the Class A and Class B promotional shares of Northrop Aircraft, Inc. received by petitioners had a fair market value of \$4.00 per share, or any fair market value, on March 4, 1940, the date of the issuance of certificates evidencing title to such shares. The Tax Court's holding to that effect is contrary to law and its finding to that effect is not supported by substantial evidence and is clearly erroneous, in the following particulars:

(a) The Ellsworth-Smith exchange, upon which the finding and decision are primarily predicated, constitutes no evidence of the fair market value of petitioners' stock.

(b) There is no other evidence to support the finding, or any finding that petitioners' stock had any fair market value.

SUMMARY OF ARGUMENT.

Petitioners contend on this appeal that The Tax Court erred both in finding that the stock of the Company received by them had a fair market value of \$4 per share, or any fair market value at all, and in concluding that 1940, rather than 1939, was the taxable year of receipt of whatever income (if any at all) was realized in connection with said stock. If petitioners prevail on either point The Tax Court's decision must be reversed.

In this brief the issue as to the year of receipt is first considered, and it is contended: first, that equitable and beneficial ownership of shares of the Company was acquired by petitioners in 1939 so that, to such extent as taxable income arose from the entire transaction, it was received in 1939, rather than in 1940, the only year here in issue; second, that the stock was constructively received in 1939, and hence can be taxable only in that year; and, third, that what petitioners received in 1939 was the equivalent of cash, and therefore taxable then and not later. If any of these three contentions is correct the petitioners must prevail in this appeal.

As to the issue of fair market value of petitioners' shares on March 4, 1940, it is submitted that The Tax Court's finding of a value of \$4 per share is arbitrary, excessive, not supported by the evidence, and based on

fallacious reasoning. First, the Ellsworth-Smith transaction of November 28, 1939, which the court regarded as “reliable” and “the best available indication” of value of petitioners’ stock, is analyzed and shown to be completely unreliable and without evidentiary value as to petitioners’ shares, because the ratios of Class A and Class B shares received by Ellsworth on the one hand and by petitioners on the other were very substantially different. Nevertheless an average value per share (of both classes, without discrimination between them) was applied blindly to petitioners’ differently assorted shares despite the lack of any evidence that shares of both classes had the same value (if either had any) and without recognition of the facts which make obvious a difference in value between them. In addition, the effect of the option which burdened 43 per cent of petitioners’ stock but applied to none of Ellsworth’s was erroneously disregarded.

Second, it is contended that there is no other evidence to support the Court’s finding of a fair market value of \$4 per share for the highly speculative and peculiarly restricted and burdened stock received by petitioners, and that on the contrary the evidence compels the conclusion that they had no fair market value at all.

ARGUMENT.

A. If Any Income Was Realized by Petitioners From the Receipt of the Company's Shares, It Was Received in 1939.

The first issue is whether the income, if any, realized by petitioners by reason of the receipt of shares of Northrop Aircraft, Inc., was received in 1939 as contended by petitioners or in 1940 as The Tax Court decided. Only the year 1940 is involved in this proceeding. Consequently, if the shares or their equivalent were actually or constructively received in 1939, it becomes unnecessary to inquire whether such shares had a fair market value in 1940.

The Tax Court held that the petitioners did not realize income in 1939 by reason of their situation with respect to the shares in question. [R. 53.] The Court reasoned that the petitioners did not actually or constructively acquire any stock or other proprietary interest in the Company in 1939, because the conditions of the Corporation Commissioner's permit authorizing the sale and issuance of such stock had not been fully complied with in that year. [R. 50-52.] The Tax Court also concluded that the contract rights received by petitioners in 1939 did not constitute the equivalent of cash because, as the Court expressed it, "we do not think that petitioners accepted these contract rights as payment." [R. 52-53.] These conclusions, we believe, are wholly erroneous and are not supported either by the facts of the instant case or by the law applicable thereto.

Our position, briefly, is that the nature of the interest in the Company received by petitioners in 1939 was such that it constituted the receipt of income in that year to the extent of its fair market value, if any. It is not of any particular consequence what that interest is called.

The Courts have used various designations for similar interests, such as "proprietary interest," "capital interest," "beneficial ownership," "property interest," "present beneficiary ownership," "economic ownership" and "equitable ownership."³ The fact remains that petitioners received in 1939 a clearly defined, enforceable property interest in the Company, whatever such interest is called.

Alternatively, we contend that under well settled principles of law the petitioners in 1939 constructively received shares of the Company regardless of whether or not petitioners technically were shareholders in that year.

Finally we believe that the receipt by petitioners in 1939 of the right to the issuance of certificates evidencing shares constituted the receipt of the equivalent of cash so as to constitute receipt of income in that year to the extent of the fair market value, if any, of the right received.

1. Petitioners Received in 1939 Equitable and Beneficial Ownership of Shares of Northrop Aircraft, Inc., the Value of Which, If Any, Was Taxable to Them in 1939.

In order to determine when, if at all, the petitioners realized income from receipt of shares of Northrop Aircraft, Inc., it is necessary to determine just what they received in 1939 and what they received in 1940. Petitioners filed their income tax returns on a cash receipts and disbursements basis. [R. 32.] Under the statute they were required to include in gross income "gains, profits, and income derived from salaries, wages, or compensa-

³*Kansas, O. & G. Ry. Co. v. Helvering* (3 Cir.), 124 F. 2d 460, 463; *Eisner v. Macomber*, 252 U. S. 189, 208; *I. C. Bradbury*, 23 B. T. A. 1352, 1361; *Commissioner v. Timmer* (6 Cir.), 78 F. 2d 599, 600; *Quincy A. Shaz McKean*, 6 T. C. 757, 762; *Schneider v. Duffy* (D. C. N. J.), 43 F. 2d 642, 645.

tion for personal service . . . of whatever kind and in whatever form paid, . . . or gains or profits and income derived from any source whatever." I. R. C. Section 22(a).

There is no doubt as to what was received by petitioners in 1940. On March 4, 1940, Northrop Aircraft, Inc., issued to John K. Northrop certificates (in which Mrs. Northrop had a community interest) evidencing 15,384 of its Class A common shares and 38,461 of its Class B common shares. [R. 39.] These certificates on the same day were placed in escrow with Bank of America National Trust and Savings Association, Los Angeles, California, pursuant to the provisions of the permit issued by the California Commissioner of Corporations, dated June 15, 1939. [R. 39.]

To determine what the petitioners received in 1939, let us examine the uncontroverted facts:

By contract dated June 17, 1939, between the Company and Northrop [Ex. 3-C] the Company as consideration for the use of Northrop's name, his past promotional services and his entering into the contract, agreed to issue to Northrop not exceeding 24,615 Class A common shares and not exceeding 61,538 Class B common shares in the ratio of one Class A share for each 16.25 Class A shares sold to the public and one Class B share for each 6.5 Class A shares sold to the public.

The contract further provided:

"(d) Northrop's rights to shares hereunder shall be deemed to have accrued as of the date of sale of the shares which shall have determined his right thereto, or as to shares issued upon exercise of warrants, as of the date of such exercise, notwithstanding the date of actual issuance thereof to Northrop." (Emphasis added.)

The considerations furnished by Northrop, enumerated above, for the shares in question were fully paid and performed by Northrop on June 17, 1939, although his rights to the shares by the terms of the contract were conditioned upon the sale of other shares to the public. The events that fixed his rights to shares and the number thereof occurred during the period beginning July 21, 1939, and ending November 28, 1939. [R. 45.] During that period 250,000 of the Company's Class A common shares were sold to the public for cash. [R. 45.] This completed the public sale of the Company's stock under the underwriting agreement as amended. [R. 45.] As of November 28, 1939, Northrop's rights to all of the shares in question had become fixed and determined. On that date, by the terms of his contract with the Company, he was entitled to 15,384 Class A shares and 38,461 Class B shares.

Notwithstanding the foregoing facts, The Tax Court concluded that Northrop did not acquire any stock or other proprietary interest in the Company in 1939 because in that year all of the conditions of the Corporation Commissioner's permit for the sale and issuance of the shares in question had not been fully complied with.

The permit [R. 36-38; Ex. 1-A, p. 13] authorized the Company to sell and issue an aggregate of 51,694 of its Class A shares and 108,307 of its Class B shares to John K. Northrop and five other individuals who had been active in the organization of the Company for the considerations set forth in the Company's application for the permit. The sale and issuance of these shares were conditioned by subparagraphs (b), (c) and (d) of the permit upon the selection of an escrow holder by the Company; the approval in writing of such escrow holder by the Commissioner of Corporations; the execution by Northrop

and the five other individuals of written waivers as to dividend rights, and rights to participate in the distribution of assets, during the period the shares were required to be held in escrow; and the filing of copies of such waivers with the Commissioner of Corporations.

The Tax Court relied solely upon the non-occurrence of certain of these conditions in 1939 to support its conclusion as to the year in which income was received by the petitioners. The escrow holder for the shares in question was selected by the Board of Directors of the Company by resolution adopted June 17, 1939. [R. 71-72.] The waiver agreement required by the permit, relating to distribution and dividend rights, was dated as of November 30, 1939, and was executed on or about January 4, 1940, and an executed counterpart thereof was filed with the Corporation Commissioner on or about January 22, 1940. [R. 38.] Bank of America National Trust and Savings Association accepted its appointment as escrow holder for the shares in question on January 6, 1940, and on January 25, 1940, the Corporation Commissioner approved the appointment of said bank as escrow holder. [R. 38, 72-73.]

Under such circumstances, may it properly be said that petitioners acquired no interest—proprietary, equitable, beneficial or otherwise—in the Company during 1939? We believe that The Tax Court's negative answer to this question is based upon a wholly unwarranted emphasis on the form of the transaction as contrasted with its substance and on a misapprehension as to the application of the California Corporate Securities Act (Deering's Calif. Gen. Laws, Act 3814) to the instant case.

Under the broad equitable principle that "equity regards and treats that as done which in good conscience ought to be done" (2 Pomeroy's Equity Jurisprudence, 5th Edi-

tion, Section 364) it is clear that Northrop became the equitable and beneficial owner of the stock in question in 1939 when he became, by the terms of his contract, entitled to such shares. *Wait v. Kern River Mining etc. Co.*, 157 Cal. 16, 106 Pac. 98; *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276; *Virginia Shipbuilding Corporation v. U. S.* (4 Cir.), 22 F. 2d 38, 50.

The equitable doctrine that a person entitled to shares of stock will be treated as the owner of that stock has found frequent application in income tax law. At the outset it is universally recognized by the courts that the certificate is not the stock itself, but is merely evidence thereof, and that a person may be a shareholder without ever receiving a certificate. *Eisner v. Macomber*, 252 U. S. 189, 208; *Kansas, O. & G. Ry. Co. v. Helvering* (3 Cir.), 124 F. 2d 460, 463. The courts have gone on from this point to hold that when, pursuant to a contract, a taxpayer has become entitled to shares of stock, he will then be deemed to have received such stock for tax purposes irrespective of whether he ever receives the certificates evidencing such shares.

Thus in *I. C. Bradbury*, 23 B. T. A. 1352, aff'd. sub. nom. *Commissioner v. Timmer* (6 Cir.), 78 F. 2d 599, the taxpayers were held to have acquired a present interest in a corporation by reason of a contract, notwithstanding that certificates evidencing such interest were never issued to them. A contract entered into to induce the taxpayers to remain in the employ of the corporation provided that the corporation would be reorganized with each of the taxpayers to receive 8% of its common stock, and that pending the completion of such reorganization the property rights of the parties in the corporation should be "precisely as though" its reorganization had become effective and the stock issued April 1, 1920, the date of the

contract. The reorganization never took place and the stock contemplated by the contract was never issued to the taxpayers. In 1925, each of the taxpayers received \$200,000 from the corporation upon the cancellation of the 1920 contracts and the surrender of their interests to the corporation. The Commissioner contended that the entire amounts received in 1925 were taxable in that year as compensation for personal services. The Board held, however, that the taxpayers acquired interests in the corporation in 1920 which interests were sold in 1925 and that the gain therefrom constituted a capital gain. The Board said (pp. 1360-1361):

“Upon consideration of the instrument as a whole, in the light of the surrounding facts and circumstances disclosed by the record, it is our opinion that, immediately upon execution of the contract, petitioners each became the beneficial owner of 600 shares, or 8 per cent, of the common stock of the corporation precisely to the same extent as if the so-called reorganization had been effected on that date and a stock certificate issued to each petitioner for the interest given to him. As such stockholder, each petitioner became entitled on April 1, 1920, to receive dividends upon the stock given to him and to exercise all other rights, privileges and duties of stockholders. . . . The fact that the contemplated ‘reorganization’ was not effected on said date and stock certificates issued to petitioners is immaterial. A stock certificate merely constitutes evidence of ownership of an interest in a corporation; it is not the stock itself nor essential to the ownership thereof. *Richardson v. Shaw*, 209 U. S. 365; *Fletcher on Corporations*, Vol. V, p. 5604, §3426.”

The Court of Appeals for the Sixth Circuit in affirming the decision of the Board in the *Bradbury* case said (78 F. 2d 600):

“Under the contract of April 1, 1920, Bradbury and Eifert acquired a present interest in the old corporation and not merely an interest contingent upon its reorganization. . . . We think it was the purpose of the old stockholders to give them a property interest in the corporation in order to retain their services, and it is our further view that this purpose was effected upon the execution of the contract. The finding of the Board of Tax Appeals to this effect is supported by both the law and the evidence.”

The *Bradbury* case was followed by The Tax Court in *W. F. Marsh*, 12 T. C. No. 144, decided June 17, 1949, on facts strikingly similar to those in the present case. There the question involved was the holding period of shares of stock. On or before October 14, 1943, the taxpayers and others loaned \$65,000 to a corporation in consideration of the corporation's promissory notes for \$65,000 and 6,500 shares of no par common stock to be issued when authorized by the corporation, said shares to be dated October 14, 1943. In February, 1944, the articles of incorporation were amended to give the corporation permission to issue 10,000 shares of common stock. Stock certificates for 6,500 of these shares were issued on February 26, 1944, but were dated October 14, 1943. Taxpayers sold certain of these shares on May 23, 1944. It was held that the taxpayers became beneficial owners of such shares on October 14, 1943, although the shares were not even authorized by the corporation's articles until February of 1944. The Court said in part:

“. . . There was never any doubt that petitioners and their associates would be the holders of 6,500

shares of common stock to be issued when authorized and to be dated October 14, 1943. In accordance with the agreement in these proceedings the stock certificates were to be dated October 14, 1943, the date by which the corporation had received the \$65,000 and had delivered its promissory notes. No other conclusion can be drawn from the fact that the certificates were to be dated October 14, 1943 than that the parties intended, as in the *Bradbury* case, *supra*, that all rights in the corporation should be established as of a stipulated date. We think it is apparent from the agreement herein that the parties intended to fix the rights of petitioners and their associates as of October 14, 1943.

“ . . . The fact that the stock was not formally issued until February 26, 1944 is of no consequence as a stock certificate merely constitutes evidence of ownership; it is not the stock itself nor essential to the ownership thereof. *Richardson v. Shaw*, 209 U. S. 365; Fletcher on Corporations, Vol. XI, p. 65, Section 5094.”

Obviously the fact that the stock certificates in the *Marsh* case were dated prior to actual issuance thereof was of significance only as evidence of the parties' intent, just as in the instant case the language of the contract between Northrop and the Company, quoted on page 16, above evidenced a similar intent.

Similarly in *Quincy A. Shaw McKean*, 6 T. C. 757, the taxpayer was held to have been the equitable owner of shares of stock, although the shares never came into his physical possession. In 1932 he advanced money to one Bird for which he was to receive an interest in stock of a corporation to be received by Bird. Bird subsequently received the stock, but failed to deliver any part of it to the

taxpayer. In 1939 the taxpayer filed a suit for specific performance of the contract for delivery of the stock. The suit was settled in 1940 by a compromise under which Bird made a cash payment. The Tax Court rejected the contention of the Commissioner that the profit realized by the taxpayer in 1940 by reason of the settlement was taxable as ordinary income or in the alternative as short term capital gain, and held that it was long term capital gain. Referring to a memorandum agreement executed by the parties in 1932, the Court said (pp. 761-762):

“Under the contract the brokers [taxpayer] made an investment in the stock, they acquired a present beneficial ownership therein, and, pending the clearing up of Bird’s financing obligations and the taxes in connection therewith, the brokers were entitled to the dividends on their shares. The fact that the shares could not at that time, and as a matter of fact never did, come into their physical possession is entirely immaterial. *I. C. Bradbury*, 23 B. T. A. 1352; *affd.*, 78 Fed. (2d) 599. They were the equitable owners of one-half of the shares that Bird had acquired.

. . .

“We conclude that by the transaction the brokers acquired an economic ownership of one-half of the stock acquired by Bird. . . .”

See also:

Schneider v. Duffy (D. C. N. J.), 43 F. 2d 642, 645, 648.

That The Tax Court in the present case gave scant, if any, recognition to the foregoing principles is obvious from the Court’s summary treatment of the problem, as follows [R. 51]:

“. . . A recognition of the distinction between the issuance of certificates and the issuance of shares

does not affect our conclusion. Nor does the fact that original subscribers to stock are sometimes regarded as stockholders even absent an issuance of shares have application here. . . .”

Apparently The Tax Court rested its entire decision as to the year of receipt of income by petitioners on the flat proposition that because the conditions of the Corporation Commissioner’s permit were not fully complied with in 1939, petitioners did not acquire any stock or other proprietary interest in the Company in that year. Although not cited in its opinion, The Tax Court obviously relied upon Section 16 of the California Corporate Securities Act (Deering’s Calif. Gen. Laws, Act 3814, Sec. 16) which as in effect in 1939 provided (1933 Stats., p. 2316):

“Sec. 16. Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by a company with the authorization of the commissioner but which has been sold or issued in nonconformity with the provisions, if any, contained in the permit authorizing the issuance or sale of such security shall be void.”

The Tax Court also relied upon *Live Oak Cemetery Association v. Adamson*, 106 Cal. App. (Supp.) 783, 288 Pac. 29. In that case suit was brought against certain individuals on their liability as stockholders of a corporation. The judgment of the trial court for the plaintiff was reversed because the stock issued to the defendants had been issued in violation of the permit issued under the California Corporate Securities Act and was, therefore, void and the defendants were not stockholders. Without questioning the correctness of the decision in the *Live Oak Cemetery* case on its particular facts, we submit that it has no application to the present situation.

It may be observed that subsequent California decisions have modified the “void” rule so that it no longer operates as a rigid criterion in all fact situations but only where it is necessary to carry out the purpose and spirit of the Corporate Securities Act. *Eberhard v. Pacific Southwest L. & M. Corp.*, 215 Cal. 226, 9 P. 2d 302; *Robbins v. Pacific Eastern Corporation*, 8 Cal. 2d 241, 65 P. 2d 42; T. W. Dahlquist, Regulation and Civil Liability Under the California Corporate Securities Act: III, 34 Cal. L. R. 543, 551-554.

More significant, however, is the fact that in the present case there is simply no room for application of the “void” rule. Nothing was done by anyone in violation of the Corporate Securities Act. Conceding The Tax Court’s point that a corporation has no inherent power to create proprietary interests independent of sovereign control, we have here a situation where the sovereign by the issuance of his permit expressly authorized the creation of the interests under discussion. Authority to create these interests was granted by the sovereign on June 15, 1939. Upon the completion of the sale of the Company’s shares to the public in November, 1939, the Commissioner’s permit had been substantially complied with and the petitioners’ interests became vested subjected only to the performance of certain ministerial acts required by the Commissioner to protect the general public. The conditions of the permit of June 15, 1939, as regards the escrow of petitioners’ shares, related solely to the certificates evidencing such shares and were solely for the protection of persons who might be injured were it possible for certificates evidencing promotional stock to be freely circulated. The waiver agreements required by the permit were merely paper evidence of an encumbrance against petitioners’ stock which existed at all times after June 17, 1939, by reason of the

terms of the permit restricting the dividend and liquidation rights of the shares in question.

The actuality of petitioners' interest in the Company in 1939 may be tested by assuming that the Company had become insolvent prior to full compliance with the conditions of the permit and prior to the issuance of certificates. Certainly, under such circumstances Northrop would not be heard to assert that he was a creditor for the value of the considerations furnished by him rather than a stockholder, because his stock was "void" under the literal language of the statute. On the contrary, it seems clear that, under the modern interpretation of the "void" rule, he would have been denied all creditor's rights and would have been treated as a stockholder, his stock being subject, however, to the restrictions as to dividend and liquidation rights imposed by the Commissioner's permit.

An examination of the facts demonstrates that the unperformed conditions of the Corporation Commissioner's permit were essentially formalities and ministerial in character. As of November 28, 1939, all that remained to be done prior to the issuance of the certificates evidencing Northrop's shares were the approval in writing by the Commissioner of an escrow holder already selected by the Company, the execution of the waivers required by conditions (c) and (d) of the permit and the filing of copies of such waivers with the Commissioner. Justus A. Hahn, Assistant Commissioner of Corporations, testified at the hearing [R. 198-199] that the escrow holder actually selected, Bank of America National Trust and Savings Association, or any one of several other Los Angeles banks with trust powers "would be proper as such escrow holders." With respect to the waivers required to be executed and filed with the Corporation Commissioner, such acts

were wholly within the control of the individuals entitled to promotional shares. Moreover, the intent of the Company and its organizers with regard to the time that interests in the Company vested in such individuals is clear from the language of the contract quoted on page 16 above and from the fact that the waiver agreement, itself, was dated and executed as of November 30, 1939 [Ex. 16-p].

J. K. McAlpine Land & Development Co., Ltd., 43 B. T. A. 520, affd. on other grounds (9 Cir.) 126 F. 2d 163, provides an answer to the contention that the interests in the Company received by petitioners were taxable in 1940 rather than 1939. In that case the corporation had issued to the taxpayer 8000 shares of stock in payment for advances made and organization services rendered by the taxpayer. The Commissioner determined an income tax deficiency based on the fair market value of the shares received. The taxpayer contended that the shares were void and had no value because no permit for the issuance thereof had been obtained from the California Commissioner of Corporations. In rejecting this contention the Board said (pp. 525-526):

“The record before us does not show that any of the recipients of the stock in question ever at any time contended that it was void and of no value. *A security may have value even if it be issued without a permit.* This was the situation in *Western Oil & Refining Co. v. Venago Oil Corporation*, 218 Cal. 733, 24 Pac. (2d) 971, wherein the court said, ‘In the case herein the units proved to be valuable, notwithstanding they were issued without a permit.’ See also *Julian v. Schwartz*, 16 Cal. App. (2d) 310, 60 Pac. (2d) 887. . . .” (Emphasis added.)

Similarly, in *Southern California Rock and Gravel Co.*, 26 B. T. A. 296, it was held that an exchange of property

for stock of a California corporation was effected for income tax purposes prior to December 31, 1920, notwithstanding that issuance of stock was not authorized by the California Commissioner of Corporations until January 24, 1921. The Board said (pp. 300-301):

“Tax liability resulting from sales of property is not determined by the date when legal title is transferred or the date on which certificates of stock are received in payment. Such liability is fixed as of the date the real benefits and burdens of ownership are transferred. *Brunton v. Commissioner*, 42 Fed. (2d) 81; *Grace Harbor Lumber Co.*, 14 B. T. A. 996; *Ohio Brass Co.*, 17 B. T. A. 1199; and *T. B. Hoffer*, 24 B. T. A. 22. Ownership of corporate stock may vest prior to delivery of stock certificates. *Richardson v. Shaw*, 209 U. S. 365; *Galbraith v. McDonald*, 123 Minn. 208, 143 N. W. 353; and *T. B. Hoffer*, *supra*.”

In *S. T. Swenson, Executor*, 14 B. T. A. 675, reversed on other grounds (5 Cir.) 56 F. 2d 544, cert. den. 287 U. S. 618, the board held that the date for valuation of stock received in an exchange was the date that an oil lease was given in exchange and the shares subscribed for, although, because of an injunction, the certificates were not issued until a later year. From the facts of the case it appears that on the date the shares were subscribed for, the issuance of such shares was not authorized by the Company's charter and that if the shares actually had been issued on that date they would have constituted an over-issue. After considering the question of fair market value, the Board said (p. 681):

“There is another question of law in the case. The respondent contends, inasmuch as the stock certificates

representing the increase of 11,000 shares in the capital stock of the Swensondale Oil Co. were not in fact issued, because of an injunction, until January 6, 1920, at which time the stock may have had a fair market value, that therefore the petitioner is assessable in some amount. Aside from the fact that this contention involves another taxable year than the one under review, it is evident that this transaction was closed with the agreement of April 17, 1919, and that the physical receipt of the certificates of stock was merely an incident thereto, and that the date under which such certificates of stock were issued or upon which they were received is of no consequence whatever. The petitioner's rights and obligations must date from April 17, 1919."

Likewise in *W. F. Marsh, supra*, page 21, beneficial ownership of shares was held to have been acquired from the date of agreement to issue such shares notwithstanding that the shares were not then authorized by the corporation's articles of incorporation and would have constituted an overissue had they been issued without such authorization.

Under the above authorities, we submit that however the interests in the Company received by the petitioners in 1939 are designated—whether as equitable or beneficial ownership of shares, proprietary interests, or economic ownership—they were interests of sufficient substance so as to constitute taxable income to the extent of their fair market value, if any, in 1939. The Tax Court should have so held.

2. **Petitioners Constructively Received the Shares of the Company in 1939 When They Became Entitled to Such Shares.**

Our position as regards the constructive receipt of shares of Northrop Aircraft, Inc., in 1939 by petitioners has been stated in the alternative because we believe that the authorities fully support our first point—that there was actual receipt of an interest in the Company by petitioners in 1939 which rendered them taxable in that year to the extent of the fair market value of the shares, if any. Obviously, there could not be a constructive receipt and an actual receipt of property on the same date. However, if it is conceded for the purpose of argument that there was no actual receipt of shares or the equivalent thereof by petitioners in 1939, we believe The Tax Court should have held that petitioners in 1939 constructively received the shares to which they had become entitled by contract.

As a preliminary matter, it may be pointed out that it now seems fairly well settled that the doctrine of constructive receipt can be asserted by a taxpayer to defeat an attempt by the Commissioner to assert a tax. In other words, the principle is one upon which the taxpayer as well as the Commissioner may rely. *Ross v. Commissioner* (1 Cir.), 169 F. 2d 483, 490-2; *Weil v. Commissioner* (2 Cir., decided April 6, 1949), 173 F. 2d 805.

The doctrine of constructive receipt has been incorporated in the Treasury Regulations from the beginning and is set forth in Regulations 101, Article 42-2, in effect in 1939, as follows:

“Income not reduced to possession.—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so

credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt."

Thus, if income—whether in the form of cash, stock or other property—is available to a taxpayer "without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is made," such income will be deemed to have been constructively received, although not reduced to actual possession. *John A. Brander*, 3 B. T. A. 231, 235; *Burns v. Commissioner* (5 Cir.), 31 F. 2d 399, 401, cert. den. 280 U. S. 564; *Schoenheit v. Lucas* (4 Cir.), 44 F. 2d 476, 481; Regulations 101, Art. 42-2, *supra*.

In the present case the shares received by Northrop under his contract dated June 17, 1939, were unquestionably available to him in 1939. As of November 28, 1939, the facts which fixed Northrop's right to stock and the number of shares to which he was entitled had occurred. His contract with the Company expressly provided that his "rights to shares hereunder shall be deemed to have accrued as of the date of sale of the shares which shall have determined his right thereto . . . notwithstanding the date of actual issuance thereof to Northrop" [Ex.

3-C]. At the end of 1939 there still remained to be complied with two conditions prescribed by the Commissioner of Corporations before the certificates to which Northrop is entitled could be issued. These were (1) execution and filing of the waiver agreements required by conditions (c) and (d) of the permit, and (2) obtaining the Commissioner's written approval of an escrow holder for the certificates. It is submitted that there is no evidence whatsoever that these conditions constituted a "substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made."

The execution of the waiver agreement and the filing of a copy thereof with the Commissioner were clearly matters solely within the control of Northrop. He could elect at any time when these acts were to be done. The fact that the Company was a party to the actual waiver agreement entered into [Ex. 16-P] is wholly immaterial, for the Company did not agree to anything it was not already bound to do under its prior contract with Northrop, and by the terms of the permit was not required to agree to anything.

Nor was the requirement that the Commissioner of Corporations approve the Bank of America National Trust and Savings Association as an escrow holder a substantial condition. Northrop, as president of the Company at all times since its inception [R. 68], was in a position at any time he chose to apply on behalf of the Company to the Commissioner for approval of the escrow holder previously designated by the Company's directors. When the Commissioner's approval of the Bank of America National Trust and Savings Association as escrow holder was sought in January, 1940, it was forthwith granted. In view of the nationally recognized position of

the Bank of America National Trust and Savings Association in the California banking field and the uncontradicted testimony of the Assistant Commissioner of Corporations [R. 198-199], there is no reason to doubt that such approval was a mere formality.

The situation in the present case as regards constructive receipt is similar to that in *Aramo-Stiftung v. Commissioner* (2 Cir.), 172 F. 2d 896. There the taxpayer, a foundation organized under the laws of Leitchenstein, was the beneficial owner of American securities which were registered in the names of brokers or their nominees. The securities were kept in a safe deposit box rented by a New York corporation, organized for the purpose of acting as custodian of the securities. Dividends were paid by the issuing corporations to the brokers, as registered owners, and the brokers retained them as unclaimed funds. In July, 1945, the taxpayer advised the brokers that it was the owner of the securities, requested them to pay the income taxes due for the years 1940 through 1945, and asked them to transfer the balance to accounts in taxpayer's name. All of the brokers refused, asking more satisfactory evidence of taxpayer's ownership of the securities, and in some cases requesting guarantees against possible conflicting claims, and stating that a Treasury license would be necessary. The Tax Court held that dividends received by the brokers during the years 1940-1943 were constructively received by taxpayer in those years, and the Court of Appeals affirmed, stating (p. 897):

“ . . . These dividends were immediately available to petitioner upon its proof of ownership, its obtaining the appropriate license, and in some cases its presenting requested guarantees. There is no evidence that petitioner could not have complied with these requirements if it had attempted to do so, or

that there were any conflicting claims to the dividends. In other words, we agree that petitioner constructively received the dividends, for nothing in the record indicates that there was any 'substantial limitation or restriction' on its right to get actual possession of them at any time it chose really to go after them."

The requirements of the Corporation Commissioner in the present case as to waivers and approval of an escrow holder are strikingly similar to the requirements as to proof of ownership, execution of guarantees and obtaining a Treasury Department license in the *Aramo-Stiftung* case. It is submitted that here also there is nothing in the record to indicate that there was any substantial limitation or restriction on Northrop's right to get actual possession of the shares at any time he "chose really to go after them."

3. The Rights to Shares Received by Petitioners in 1939 Constituted the Equivalent of Cash to the Extent of Fair Market Value, if Any, in That Year.

Although the term "equivalent of cash" has been called largely a misnomer (2 Mertens, Federal Income Taxation, Sec. 11.02), we believe that, properly used and defined, it furnishes a useful tool to demonstrate the soundness of our position with regard to the year of receipt of income by petitioners.

As a preliminary step, let us see what is meant by the term "equivalent of cash." The elementary concept of income as solely cash received was, of course, long ago abandoned in tax law. Various economic benefits, other than cash, have long been treated as taxable income, and this is true whether the taxpayer is on a cash or accrual basis.

As stated by the Supreme Court in *Commissioner v. Smith*, 324 U. S. 177, 181:

“Section 22 (a) of the Revenue Act is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected.”

Mertens in his treatise on “The Law of Federal Income Taxation” devotes an entire chapter to “Income and Deductions in the Equivalent of Cash” (Vol. 2, Ch. 11). He states in Section 11.02:

“The term ‘equivalent of cash’ as used in the determination of liability for income tax is largely a misnomer. Basically the term means that property has been received which is other than cash and which has a fair market value. It implies that the value is just as determinable as though cash were received, also that the taxpayer has something which is presently disposable the same way as cash is disposable. The term, however, has taken on over the years a broader meaning. Occasionally it means receipt of benefits and at other times it may mean a substitute for income or a flow of satisfaction or a benefit accrued. A review of comparatively recent cases indicates that the old doctrine of equivalent of cash is outmoded and that an entirely new orientation of this concept is required.”

Although The Tax Court did not define “equivalent of cash” in its opinion, the term can have only its basic meaning in the present case, namely, that presently disposable property has been received which is other than cash and which has a fair market value. 2 Mertens, Sec. 11.02,

supra. In finding that the Northrop promotional shares had a fair market value of \$4.00 a share as of March 4, 1940 [R. 49], The Tax Court was itself applying the equivalent of cash doctrine as defined above. As evidence to support its finding that petitioners in 1940 received the equivalent of cash, The Tax Court relied almost wholly upon the Ellsworth-Smith transfer which was consummated November 28, 1939 [R. 39-40], referring to it as “the best available indication of the approximate value of the promotional shares.” [R. 55.]

For reasons hereinafter stated, we believe that the Ellsworth-Smith transfer furnishes no evidence of fair market value of Northrop's shares on November 28, 1939, or on March 4, 1940, or on any other date. If we are correct in this, then Northrop did not receive the equivalent of cash either in 1939 or in 1940. However, if the Ellsworth-Smith transfer is any evidence that the Northrop shares had fair market value on March 4, 1940 (which we do not concede), it is equal or stronger evidence that Northrop's rights to shares had fair market value on November 28, 1939, and that such rights constituted the equivalent of cash.

The Tax Court attempts to avoid this obvious inconsistency in its decision by “rejecting” the application of the equivalent of cash theory on the ground that “we do not think that petitioners accepted these contract rights as payment.” [R. 52.] In answer to this, it may be pointed out first that there is nothing in the record to support The Tax Court's statement that the “contract rights” were

neither given nor accepted by petitioners as payment of the Company's undertaking to issue shares. On the contrary, the evidence shows that the parties were not particularly concerned with when the certificates evidencing their shares might be issued, but were vitally concerned with the date that their rights to shares "accrued." Such evidence is found in the language in each of the six contracts for issuance of promotional shares [Exs. 3-C to 8-H, incl.] to the effect that each individual's rights to shares "shall be deemed to have accrued as of the date of sale of the shares which shall have determined his right thereto." Further evidence on this point is furnished by the fact that while the stock certificates unquestionably could have been issued within a few days after November 28, 1939, the parties did nothing about it until January, 1940, and did not cause the certificates actually to be issued until more than three months had elapsed after their rights thereto had accrued. [Stip. pars. 29-34, R. 72-74.]

This brings us to our second point on the payment question. The Tax Court cited four cases (*San Jacinto Life Insurance Co.*, 34 B. T. A. 186; *Frank Kuhn*, 34 B. T. A. 274; *Great Southern Life Insurance Co.*, 33 B. T. A. 512, affirmed 89 F. 2d 54, certiorari denied, 302 U. S. 698, and *Schlemmer v. United States*, 94 F. 2d 77) to support its conclusion that the equivalent of cash theory has no application to the present situation. All of these cases involved promissory notes, and it is submitted that they are not in point, because in each there was simply a substitution of new evidence of indebtedness for a pre-existing money obligation. It may be noted in passing

that in *Schlemmer v. United States, supra*, there was actual testimony that the note in question was not taken in payment, but only as more permanent evidence of the debt (94 F. 2d at 78). But whatever the rule may be as to whether the giving of a promissory note constitutes payment (*Cf. Anthony P. Miller, Inc. v. Commissioner* (3 Cir.), 164 F. 2d 268), we submit that such rule has no application to the present case, which involves shares of stock and not obligations to pay money.

The distinction between a simple money obligation and an obligation to sell or issue stock not readily procurable elsewhere is instantly apparent. An obligation to pay money is generally enforceable only at law, and is treated as a receivable until actually paid in cash or by check or in some instances by promissory note. An enforceable contract to convey land, or a unique chattel, or shares of stock which are not readily obtainable elsewhere, on the other hand, is enforceable in equity and operates to create an equitable title to such property in the vendee. As heretofore pointed out, the petitioners by November 28, 1939, had acquired a well defined property interest, specifically enforceable in a court of equity. To paraphrase the term used by The Tax Court, they received in 1939 at least the "equivalent of shares." If such equivalent of shares had a fair market value in 1939 (as The Tax Court impliedly found), then the petitioners received the equivalent of cash in that year, and The Tax Court should have so held.

B. The Valuation of Petitioners' Stock at \$4 Per Share Is Arbitrary, Excessive, Not Supported by the Evidence, and the Result of Fallacious Reasoning.

1. The Ellsworth-Smith Exchange Is No Evidence Whatever of the Fair Market Value of Petitioners' Stock.

The finding and decision of The Tax Court that the Class A shares and Class B shares received by petitioners had a fair market value of \$4 each is predicated squarely on the Ellsworth-Smith exchange. This transfer is said by the Court to be “the best available indication” of value of the promotional shares and to offer “a reliable approximation of value.” [R. 55.] The process followed by the Court was to make a small adjustment from the value paid by Smith in that transaction, and apply the adjusted figure directly to petitioners' stock.

If, therefore, application of the Ellsworth exchange to petitioners' stock is erroneous either because there is no connection between them in logic, or because in making its adjustment the Court neglected to give effect to an important difference between the stock involved in the two cases, the Court's finding and conclusion as to value loses its entire foundation and must fall. We propose to show that the Court erred in both these respects.

- (a) THE VALUE PAID FOR ALL OF ELLSWORTH'S STOCK BEARS NO LOGICAL RELATION TO THE VALUE OF ALL PETITIONERS' STOCK.

Here we propose to show that the reasoning followed by the Court is necessarily and inherently fallacious. The error committed by the Court is plain and fundamental. The fallacy lies in determining the average amount per share paid by Smith for all Ellsworth's stock, and applying that average (even with the slight adjustment made by the Court) to all of petitioners' stock. The analysis of this obvious logical fallacy follows.

- (1) *The "Average" Method Makes a Wholly Arbitrary Comparison Unless A and B Shares Had the Same Value.*

The stock transferred in the Ellsworth-Smith transaction consisted of 1,538 A shares and 2,307 B shares—a ratio of 2 A shares to 3 B shares. [Findings, R. 39.] The Court said the transfer indicates an approximate value of \$4.50 per share—that is, for the whole 3,845 shares. By reason of the managerial relationship of Northrop to the Company (not existing in the case of Ellsworth), the larger number of shares in Northrop's case, and the unproved position of the Company, the Court slightly reduced the \$4.50 figure to \$4—again for all shares, A and B alike. [Opinion, R. 55.]

Giving effect to this adjustment, then, the Court found that 1,538 A shares plus 2,307 B shares were worth \$15,-380—or 2 A shares plus 3 B shares were worth \$20. The Ellsworth transaction can possibly be evidence *only* of the fact that this particular combination of shares had this value. The A shares could be worth between \$10 per share and zero, and the B shares between zero and

\$6.67 per share, the value of each class declining as the other increases, and vice versa.

The stock received by Northrop consisted of 15,384 A shares and 38,461 B shares—a ratio of 2 A shares to 5 B shares. The asserted fact that Ellsworth's stock had an average value of \$4 per share is no evidence whatsoever that Northrop's stock had an average value of \$4 per share.

To use a homely example: Jones owns two horses and five cows. The question of their value is in issue. Evidence is given that Mr. Smith sold two horses and three cows for \$20 for the lot—averaging \$4 per unit. It does not follow that Jones' livestock has an average value of \$4 per unit or a total of \$28.

This is obvious. The fallacy lies in the fact that the proportions of horses and cows are different in the two cases.

In the instant case the same fallacy exists. At an average of \$4 per share, Northrop's stock had a value of \$215,380. However, an A stock value of \$7 per share and a B stock value of \$2 per share would be equally compatible with the Ellsworth-Smith transfer, as in his case the average would still be \$4 per share; but in such case the value of Northrop's stock would be only \$184,610. (The figures used are only for the purpose of illustration.)

The point does not require belaboring. It is simply that reasoning from the Ellsworth exchange without determining the values of A and B shares separately, is impossible where there is a difference in the ratios of the two classes. The only instance in which this obvious logical fallacy does not exist is when the values of A and B shares are identical. We therefore turn to a consideration of the evidence, or absence thereof, to support a con-

clusion that a share of A stock had the same value as a share of B stock on March 4, 1940.

(2) There Is No Evidence That A and B Shares Had the Same Value, if Either Had Any Value.

It is of course true that both of petitioners' expert witnesses testified that neither the A shares nor the B shares received by Northrop had any fair market value on March 4, 1940. They gave their opinion that the A shares had no fair market value and that the B shares had no fair market value. This cannot be twisted into evidence that if the A shares had fair market value, the B shares had an equal fair market value. Having reached their opinions that the A shares had no fair market value, it obviously followed (because of the junior position of the B class) that the B shares were in the same condition. The experts could not indicate a lower value for the B shares by giving them "red" or negative value.

What else is there in the record to support the finding (which is indispensable to any reliance whatever on the Ellsworth-Smith exchange) that shares of these two classes had the same value? It is submitted that the most painstaking search of the record discloses no scintilla of evidence to this effect. Certainly the Ellsworth transfer, relied upon so heavily by the Court, is no evidence of *this* purported fact. The Court's effort [R. 54-55] to justify its erroneous conclusion of equivalence in value is considered in detail below.

On the other hand, there is ample evidence that the B shares were so heavily restricted, above and beyond the A shares, that failure to distinguish between them is clearly arbitrary. Thus:

(a) A shares were restricted as to dividends only so long as they should remain in escrow under the

Corporation Commissioner's permit. [Findings, R. 38.] In addition to the same restriction, no dividends could be received on B shares under the Articles of Incorporation until July 1, 1942 and none thereafter unless specified earnings per A share were received by the Company. [Findings, R. 41.]

(b) So long as A shares remained in escrow they could not participate in liquidating distributions until the shares owned by the public had been fully liquidated at the rate of \$6 per share. [Findings, R. 37.] B shares suffered from this same restriction indefinitely, even after release from escrow. [Findings, R. 41-42.]

(c) Sixty per cent of Northrop's B shares were subject to an option (not applicable to any of the A shares) held by the Company to purchase the same at 25 cents per share in the event of Northrop's decrease or termination of his employment by reason of his default. [Findings, R. 35-36.]

(d) All B shares would become void if no "adjusted net profits" were earned by the Company either during the five-year period commencing August 1, 1939, or during the three-year period commencing August 1, 1941. [Findings, R. 42.] No such limitation was imposed on the A shares.

B shares could escape these heavy burdens and attain parity with A shares only upon conversion into A shares. They would become so convertible on August 1, 1944 only if adjusted net profits had then amounted to 50 cents per Class A share each year for the five-year period commencing August 1, 1939, or for the three-year period commencing August 1, 1941. If such earnings should be less than 50 cents per annum per Class A share for such

period, then Class B shares were to be convertible into a proportionately smaller number of Class A shares. They could become convertible prior to August 1, 1944, only if and when the adjusted net profits computed from either August 1, 1939, or from August 1, 1941, should amount in total to \$1,000,000. [Findings, R. 42.]

In the face of these undisputed facts, it is impossible to conclude that shares of these two classes had identical, or even approximately the same, values. Yet without this vital link the chain with which the Court seeks to bind the Ellsworth transaction to the fair market value of petitioners' shares falls in pieces.

(3) *The Reasons Advanced by the Court for Valuing A and B Shares Alike Are Clearly Erroneous.*

In concluding this phase of the argument, it is necessary to consider one by one the reasons advanced by the Court for failing to value separately the A and B shares received by Northrop. The Court frankly admits [R. 54] that it "treated" the shares of the two classes "as equivalents."

Note carefully this wording. The Court does not flatly state that they *were* equivalents, but only that it "treated" them as such. At the outset it is urgently submitted that the Court meant what it said, missing entirely the point made above that the respective ratios of the two classes of stock involved in the Ellsworth transaction differed greatly from those received by Northrop. This conviction is strengthened by the language immediately following, that this treatment was adopted "for convenience and simplicity." [R. 54.] It is obvious that the Court would not have adopted a method or procedure of "treatment" of the case, just because it was more convenient and simpler to do so, if it had realized that by so doing it was involv-

ing itself in a fallacy of logic which was bound to result in an arbitrary and excessive valuation of Northrop's stock. Hence, we reiterate, the Court did not conclude that the B shares actually were the equivalent of A shares in value.

Nevertheless, the opinion does proceed to attempt to support this theory of equivalents on the basis of reality. It makes these points which are disposed of as follows:

(i) The "parties approach the problem" as if shares of the two classes were equivalent. [R. 54.]

The Commissioner's contention for a value of \$6.25 per share without distinction between classes cannot, of course be held against or estop the petitioners. The petitioners asserted that the shares of neither class received by them had any fair market value. However, conscious of the possibility that the Court might find some value for the A shares, the petitioners strongly emphasized in their briefs the peculiar burdens that rested on the B shares, of which the A stock was free. The Court's statement, as applied to petitioners, is simply incorrect. They never conceded, or even intimated, that if the A shares had a fair market value the B shares had the same value.

(ii) The limitations imposed on all the promotional stock "virtually eliminated any distinction" between the two classes, "as a practical matter." The junior position of Class B shares does not have "significance" because of the waivers as to dividends and distributions. [R. 54-55.]

Although the limitations imposed by the Commissioner of Corporations applied in common to both classes of promotional shares, the B shares were

burdened by the Articles of Incorporation and the employment contracts with a series of extremely important restrictions which did not apply at all to the A shares received by Northrop. These are detailed above (pp. 42-43). It is just not true that virtually no difference remained between the two classes of shares received by Northrop. And what does the Court imply by its use of the word “virtually” and the phrase “as a practical matter”?

(iii) The option to repurchase has “little significance” because the petitioners were the directors of the Company. [R. 54.]

We ask again, what does the Court imply by using the word “little”? If distinction between the two classes persisted even to a slight degree despite the promotional limitations “virtually” eliminating it “as a practical matter,” and despite the option having “little” significance, the Court erred as a matter of law in applying the Ellsworth-Smith average price to Northrop’s stock. We respectfully object to the Court attempting to be practical at the expense of being right.

However, the implication that the petitioners, being directors, would refrain from exercising the option regardless of circumstances is untenable. The petitioners at all times constituted a minority of the directors. Northrop was a minority of one; Mrs. Northrop was never a board member. If the right to exercise the option should arise because of Northrop’s death, he, of course, would not be there to cast his vote and influence against an exercise. If arising because of termination of his employment by reason of his default under the employment agreement, it may be speculated with reasonable certainty that

his vote and influence would not long persist. The very circumstance giving rise to the right of exercise would necessarily deprive his directorship of all significance.

(iv) Exercise of the option would have resulted in an “increase [of] the value of the Class A shares.” [R. 54.]

Even if true, this would not justify averaging Northrop's stock at approximately the same figure as the average price paid for Ellsworth's stock by Smith. By its statement the Court impliedly admits that the option is a depressing factor as to the B stock, but argues that to the extent the B value is depressed thereby the A value is correspondingly increased. But as shown above, ignoring the difference (admitted by the Court here) in value between A and B shares, and then applying the average in Ellsworth's case to all Northrop's shares without recognizing the difference in the relative proportions of the two classes in the two cases, renders the logical process wholly invalid.

However, the statement is demonstrably untrue as applied to the Northrop stock, for the following reasons:

First—If the Court means anything by this assertion it must mean that upon exercise of the option the full value theretofore represented by Northrop's A and B shares combined, would thereafter inhere in his A shares. Let us test this dictum:

At \$4 per share the Northrop A stock (15,384 shares) would be worth \$61,536 and his optioned B stock (23,077 shares) would be worth \$92,308. The Court says that if the optioned B shares were purchased at 25 cents per share (a total purchase price

of \$5,769), the difference between this purchase price and the asserted value of such shares (\$92,308) would be added to his A shares. Adding this difference of \$86,539 to the former A share value of \$61,536 produces a value of \$148,075 for these 15,384 shares, or \$9.63 per share. Thus the Court in essence says that even if Northrop's optioned B shares were actually worth only 25 cents each, his highly restricted A shares were really worth at least \$1.63 per share more than the highest price paid for unrestricted A shares at any time during the year 1940, *i. e.*, \$8 per share. [R. 48.]

Second—Of course, the Court's error which leads to the absurd result just shown lies in assuming that the purchase of Northrop's optioned B shares would benefit Northrop's A shares alone, to the exclusion of all other A shares. This assumption is obviously wrong. Here are the actual mathematics of the case:

If Northrop's optioned B shares having a postulated worth of \$4 per share, were purchased by the Company at 25 cents per share, Northrop would thereby incur a loss of \$3.75 per share, or a total loss of \$86,539. The Court says the value of his A shares would be increased by the same amount. On the contrary, this amount would redound equally to the benefit of the approximately 280,000 A shares outstanding [R. 46], at the rate of less than 31 cents per share. Northrop's 15,384 A shares would benefit only to the extent of about \$4,750. Far from breaking even on the transaction, as the Court says he would, Northrop would have a net loss of approximately \$81,789.

(v) "The provision calling for cancellation of Class B shares . . . if they failed to become

convertible” has no significance because such cancellation would occur only if there were no adjusted net profits, and therefore the A shares “would have remained in escrow subject to the waivers.” [R. 54.]

First, it should be noted that the Court has its facts wrong. In actual fact 5,240 of his A shares were released to Northrop on November 19, 1940 [R. 41], whereas the Company had no net earnings until its fiscal year ending July 31, 1942 [R. 47] and none of the Class B shares became convertible until August 1, 1942 [R. 42].

In the second place the Court overlooks entirely the very reasonable possibility that the Company might have some earnings, but less than the rate required to permit conversion of all B shares on a share for share basis. In that event, the B shares would be convertible into a proportionately smaller number of A shares, and the A shares would be released from the escrow and the enforced waivers.

Aside from these factual errors, the only meaning we can read into this statement is that in the circumstances supposed by the Court Northrop would be no worse off with only his A shares than he would with both A and B, because the latter would be worthless both before and after cancellation. It is implied that in this situation both classes of promotional stock would be worthless, and hence both may be valued alike; and further that the A shares would be worthless because they would be still “in escrow subject to the waivers.”

If being “in escrow subject to the waivers” causes worthlessness, then all the stock received by Northrop was without fair market value as contended by petitioners and contrary to the Court’s conclusion.

Yet no other reason is suggested why the A shares would be worthless in the supposed circumstances.

Perhaps too much space has been devoted to the Court's self-justification for its treatment of A and B shares received by Northrop as equivalent in value, share for share. But this point is of the very essence. For if, as contended by petitioners, there is no evidence in the record that the two types of shares had equal value, and the Court's reasons for concluding that they did were all erroneous, then it inevitably follows that application to all Northrop's shares of an average derived from Ellsworth's exchange of his shares is necessarily productive of an arbitrary value unsupported by any evidence.

(b) THE COURT'S FAILURE TO GIVE EFFECT TO THE COMPANY'S OPTION AS TO A PORTION OF NORTHROP'S B SHARES IN APPLYING THE ELLSWORTH EXCHANGE PRICE TO NORTHROP, IS AN ERROR OF LAW.

The Court says that in translating the Ellsworth exchange price of approximately \$4.50 per share into a value of \$4 per share for Northrop's stock, it gave consideration and effect "to such factors as" the managerial relation of Northrop to the Company, the large number of shares he received, and the unproven position of the Company. [R. 55.] The Court does not here list the Company's option which affected 23,077 of his B shares—almost 43 per cent of his total stock. Nor can it be contended that this factor was included within the embrace of the phrase "such factors as," because the Court squarely negatives this possibility by saying:

"The Company's option to repurchase the promotional Class B stock for 25 cents a share seems to us to have little significance for evaluation purposes . . ." [R. 54.]

Failure to give effect to this vital difference between Ellsworth's stock (none of which was subject to any such option) and Northrop's stock is a clear error of law that renders arbitrary and excessive the Court's conclusion. This distinction robs the Ellsworth sale of all probative value it might otherwise have had.

That such an option has an extremely important effect on fair market value is established beyond any doubt by numerous decisions. In option cases where there is in existence a presently exercisable right in another to compel the owner of property to sell it at a fixed price, that option price is uniformly held to constitute the absolute upper limit of the fair market value of the property subject to the option. *Helvering v. Salvage*, 297 U. S. 106, 109; *Lomb v. Sugden* (2 Cir.), 82 F. 2d 166; *Wilson v. Bowers* (2 Cir.), 57 F. 2d 682; *Estate of Anna D. Childs*, T. C. Memo. Dec. Docket No. 111,548, 6-30-43; *Estate of John Q. Strange*, B. T. A. Memo. Dec. Docket No. 106,936, 4-29-42; *Edith M. Bensel et al., Executors*, 36 B. T. A. 246, aff'd. *sub. nom. Commissioner v. Bensel* (3 Cir.), 100 F. 2d 639; *Helen S. Delone*, 6 T. C. 1188.

In cases where the option price is not irrevocably fixed (such as an option to buy stock at its book value sometime in the future as involved in *Commissioner v. McCann* (2 Cir.), 146 F. 2d 385; *Behles v. Commissioner* (7 Cir.), 87 F. 2d 228; *C. T. Kline*, 44 B. T. A. 1052, aff'd. 130 F. 2d 742, cert. den. 317 U. S. 697), or where the owner is bound to offer property to another on certain terms only *if* he should desire to sell (as in *Worcester County Trust Co. v. Commissioner* (1 Cir.), 134 F. 2d 578; *Krauss v. Commissioner* (5 Cir.), 140 F. 2d 510; *Halsted James*, 3 T. C. 1260, aff'd. (2 Cir.) 148 F. 2d 236), the existence of the options has uniformly

been held to have a depressive effect upon the market value of the optioned property (as compared with similar property free from the option) even though the option price in such cases has not been treated as fixing a ceiling on market value.

In this case, the option price was not dependent upon future uncertainties, but was irrevocably fixed at 25 cents per share. And the exercise of the option was in no way dependent upon the desire of petitioners to sell, but only upon the sole discretion of the Company in either of two events: (1) Northrop's death or (2) termination of his employment contract by reason of his default. The first condition, at least, was one wholly beyond the control of petitioners or anyone who might buy their option shares,—a condition which might happen at any time, leaving the holder of the stock no choice but to sell at the fixed price of 25 cents per share if the Company should see fit to exercise its option. And the second condition, even if the matter of default under his employment contract be thought to be within Northrop's control, was subject to no volition on the part of any purchaser of the stock.

In these circumstances, we submit that the instant case falls within the rule that a definitely fixed option price, at which an owner of property can be compelled to sell to an option holder irrespective of the owner's desires in the matter, constitutes the maximum limit of the fair market value of the property subject to the option. Petitioners' 23,077 Class B shares subject to the Company's option thus could not properly be found to have a fair market value in excess of 25 cents per share.

And even if the option here, because of the conditions applicable to its exercise, be thought not to fall within the above rule, then at the very least the option was a

depressive factor with relation to the market value of the optioned stock which the Court erred in disregarding or in relegating to a position of "little significance." A prospective purchaser of petitioners' optioned stock would, of course, realize that if Northrop should die or should default under his employment contract within the option period (events over which the purchaser could have no control), he might be compelled to sell that stock to the Company at 25 cents per share. It is incredible that such a purchaser would be willing to pay as much for any property subject to such an option as he would for like property not so encumbered.

Thus, whether the option be regarded as fixing an upper limit on the fair market value of the Class B shares affected thereby, or merely as a depressive factor with respect to such value in relation to the value of similar unoptioned shares, The Tax Court's failure to give effect thereto constitutes an error of law. This error is particularly obvious, and fatal to the Court's conclusion, because about 43 per cent of the property received by petitioners was subject to the option, and therefore a different kind of property (at least from a valuation standpoint) from any of the property involved in the Ellsworth-Smith transaction. The two cases are plainly and simply not comparable to each other.

(c) THE ELLSWORTH-SMITH TRANSACTION IS ENTITLED TO LITTLE OR NO WEIGHT BECAUSE OF ITS ISOLATION, THE PERSONAL SOLICITATION AND NEGOTIATION REQUIRED, AND OTHER LIKE FACTORS.

It has been shown above that the Ellsworth transfer is in no way pertinent to a determination of the fair market value of the stock received by petitioners, first, because of the difference in ratios of A and B shares in the two instances, and second, because none of Ellsworth's stock

was subject to the 25 cents option which affected about 43 per cent of Northrop's stock. It is now submitted that even if there were some relevance between the Ellsworth transaction and the value of petitioners' shares, still the circumstances of the Ellsworth-Smith trade were such that it could properly be given little or no weight as evidence of fair market value of even the very kind of shares which it involved. Yet it is perfectly apparent from The Tax Court's opinion that overwhelming weight was ascribed to it in reaching the decision.

The Ellsworth transfer was, as admitted by the Court [R. 55], an isolated transaction, no other sale or exchange of promotional stock having been made prior to termination of the escrow. The Court's characterization of this as a "*somewhat* isolated transaction" (emphasis added) is a masterpiece of understatement. That transaction (1) occurred more than three months prior to the valuation date, (2) was the result of personal solicitation and negotiation over a period of 90 days with a party particularly interested in Southern California aviation stocks, (3) involved only 10 per cent of the number of Class A shares and only 6 per cent of the number of Class B shares held by petitioners, and (4) involved payment of a 12 per cent commission or profit to the intermediary negotiating the transaction. [R. 39, 129-130.] These peculiar and unusual circumstances are sufficient in themselves to deprive that transaction of any substantial weight as evidence of fair market value, and one of petitioners' expert witnesses so testified. [R. 191.] See *Wood v. United States* (Ct. Cls.), 29 Fed. Supp. 853 (isolated transaction involving relatively small block of shares); *Heiner v. Crosby* (3 Cir.), 24 F. 2d 191 at 193 (sales of small lots); *Phillips v. United States* (W. D. Pa.), 12 F. 2d 598 at 601 (sales of small lots); *Daniel Kelly, et al.*, 10 B. T. A. 141 at 155

(personally solicited sales); *Frederick H. Zeigen*, 10 B. T. A. 844 (personally solicited sales in small lots at high commission rate); and *Premier Packing Co.*, 12 B. T. A. 637 at 644 (high commission rate).

2. There Is No Other Evidence to Support the Court's Valuation.

We have shown that Ellsworth's exchange of his shares cannot be logically related to the issue of valuation of petitioner's stock, and that the former affords no support for the Court's decision. We have made the point that the Ellsworth transaction was obviously the prime cause for the valuation of \$4 per share placed by the Court on all the stock received by petitioners. Any argument that the Court's error does not require a reversal because it said also that it had considered "all the other pertinent evidence bearing on value" would be the merest quibble. As to this, we rest upon the language of the opinion. [R. 55.]

We now propose to show that there is no evidence in the record that securities of the kinds received by petitioners had any fair market value whatever. To this end it is necessary to give careful attention and analysis to the various securities which were issued by the Company, and to segregate those portions of the evidence which relate severally to the different kinds of securities which were issued.

In order to avoid the pervasive error into which The Tax Court fell it is essential to list the different kinds, categories or types of securities issued by the Company.

These are:

Type 1—A shares sold to the public.

Type 2—Warrants to purchase A shares.

Type 3—Escrowed A shares owned by persons not occupying responsible management positions (such as those which Ellsworth was entitled to receive).

Type 4—Escrowed B shares owned by persons not occupying responsible management positions.

Type 5—Escrowed A shares owned by persons vital to the Company (such as those which Northrop received).

Type 6—Escrowed B shares owned by persons vital to the Company.

Type 7—Escrowed B shares which were subject to the option to repurchase.

The provisions contained in the articles of incorporation, Northrop's employment contract, the Corporation Commissioner's permit and the agreements executed as required therein, in combination created most substantial and important differences between any one of these types of securities and each of the other six types. These were so basic as to cause the securities themselves to differ in kind, not merely in degree.

The Court did not purport to predicate its conclusion on the value of the warrants, so their relationship to the other types of securities needs not be dwelt upon. It recognized that the value of the A shares sold to the public bore no direct relation to the value of the shares in issue. This leaves for consideration Types 3 to 7, inclusive.

The securities sold by Ellsworth were of Types 3 and 4. Those received by Northrop were of Types 5, 6 and 7. The differences between them are:

(a) The effect of managerial ownership, affecting Types 5, 6 and 7, but not Types 3 and 4; and

(b) The option to repurchase at 25 cents a share, affecting only Type 7.

It has already been noted that the Court expressly recognized the validity of the first of these differences, giving it as one of the reasons for reducing the Ellsworth-Smith sale figure of \$4.50 to \$4. The Court felt that this difference, in combination with discrepancy in the size of blocks of shares involved and the unproved condition of the Company required the adjustment of 50 cents a share (although the last of these three factors obviously bears in no way on a comparison of the value of Ellsworth's shares with those of Northrop).

Although the Court did thus attach some significance to the managerial relationship of Northrop to the Company, it is submitted that it failed to realize that the managerial factor makes the shares of Types 5 and 6 truly a different *kind* of property as to valuation from what would otherwise be their counterparts, Types 3 and 4.

The evidence to this effect is definite, unqualified, uncontradicted and unshaken by cross-examination. The witness Lester, president of one of the underwriters, also one of the directors of the Company at and before the basic date [R. 139], a qualified expert witness, testified that his opinion that the shares received by Northrop had no fair market value was based in part on the fact that Northrop, Cohu, Irving, Bellande and Stevens were the foundation upon which the whole corporation, and the sale of its stock, was based [R. 144]; that with that group, and its peculiar experiences, being tied in to the Company, there was a substantial financial prospect for success of the Company [R. 145-146]; that that particular group was responsible for the marketing of the securities [R. 146] and that no informed investor would have paid anything

for the stock of any of those men. [R. 146.] On cross-examination he testified that if any of these men had offered their shares for sale, it would have dissipated the confidence of the public in the enterprise [R. 161]; that if he had known of an offering by one of these persons he would have recommended to his customers to dump their shares quickly for anything they might get, and that they would not have received any value for the stock in those circumstances [R. 162]; that he would have persisted in such advice up to the point where there was no orderly market left [R. 169], and that by reason of the effect on the market and the weakening of the Company's competitive position which would have ensued, there would have been only a salvage operation left. [R. 170.] Lester also testified [R. 150] that he had taken the Ellsworth transaction into consideration and that it was entirely different for him to have dropped out of the enterprise than would have been the case with Northrop; that it was not contemplated that Ellsworth had any interest in the Company and that he had no official position with the Company, nor any background in the aircraft industry.

There can be no doubt of Lester's qualifications as an expert—they were not questioned in any respect by the Government. Nor can it be gainsaid that Lester was an "insider" and understood the circumstances and the various factors that made possible a marketing of any stock at all, and that would have affected the market for this stock in the event of an offering by Northrop of any portion of his stock. His testimony as to the difference between a sale by Ellsworth and a sale by Northrop, as well as all his other testimony referred to above, make perfectly clear the difference in kind between shares of Types 3 and 4 owned by Ellsworth and shares of Types 5 and 6 owned by Northrop.

The differences between Types 3 and 4 on the one hand, and Type 7 on the other are even more striking. In the first place, since Type 7 was received only by those persons who held important positions of management with the Company, the differences already discussed are present in this comparison also. In addition, there is the most important distinction that the Company's option to repurchase at 25 cents a share applies only to the shares of Type 7, and not to shares of any other type. This vital distinction was airily brushed aside by the Court with the statement that it "seems to us to have little significance for evaluation purposes" for the reasons stated in the opinion immediately thereafter and discussed at length above (pp. 46-48). The authorities amply demonstrate that the existence of such an option puts the shares affected thereby into an entirely different category for valuation purposes from similar shares not affected by such an option (see discussion at pp. 50-53 above).

Because of these differences in kind among the various types of securities issued by the Company, the following question assumes the utmost importance: What evidence is there in the record as to the value of shares of Types 5, 6 and 7?

The evidence offered by Northrop consists of the opinions of two admittedly qualified experts, both of whom testified that all of Northrop's shares, including his Class A shares, his Class B shares not subject to the option, and his Class B shares which were subject to the option, had no fair market value. [R. 143-144, 183-184.] The Government offered no evidence whatsoever to rebut this testimony. It contented itself to attempt on cross-examination, first, to shake the witnesses in their opinion by asking a series of questions which were well calculated

to produce that result had it been possible, and second, to elicit by cross-examination the general prospects of the aircraft manufacturing industry in the circumstances which existed in 1939 and 1940, and the specific prospects of Northrop Aircraft, Inc. The Government did not succeed in shaking the opinion of the witnesses. It did succeed in showing a fact which was never questioned by Northrop, nor was attempted to be hidden or beclouded on his behalf, namely, that the Company, despite the refusal of the market to absorb the number of shares which had been deemed necessary to be sold in order to produce the required working capital [R. 44-45], despite the slowness with which anticipated orders were being received [R. 46, 156], and despite the knowledge by March 4, 1940, that work already undertaken would show a loss [R. 93] whereas it had been anticipated that it would break even [R. 90-91], still had prospects for success in the business and for obtaining its reasonable share of the military aircraft orders which had been increasing and which it was reasonably anticipated would continue to increase. Without these favorable factors the underwriters would not have been able to dispose even of the 250,000 shares which they managed to sell, out of a planned sale of 400,000 shares. Without these favorable factors the market for the unrestricted Class A shares which had been sold to the public would not have remained even as high as the minimum \$5 per share figure at which shares of this type sold during the year 1940. [R. 48.] Without these favorable factors, the Company would have been doomed to the failure which engulfs such an extremely large percentage of new business enterprises.

What the Court failed to recognize, and in so failing committed a clear error, is that the generalities of this kind appearing in the stipulation of facts and the testi-

mony afford no evidence that any of the types of security other than the unrestricted Class A shares sold to the public for cash had any fair market value.

We comb the record in vain for any evidence whatever that the highly restricted shares received by those persons who held positions of important managerial responsibility to the Company, indeed constituted the backbone of the entire structure, had any fair market value. The testimony of the qualified experts on this issue remains wholly uncontradicted and therefore should have been accepted by the Court as conclusive. *Belridge Oil Co. v. Helvering* (9 Cir.), 85 F. 2d 762; *Boggs & Buhl, Inc. v. Commissioner* (3 Cir.), 34 F. 2d 859. The failure of the Government to offer any testimony whatsoever on the issue of valuation, whether by way of expert witness or otherwise, is of vital significance. In these circumstances not only is the Court unjustified in substituting its own arbitrary judgment of value for that of the experts, but it has no choice but to find in accordance with the uncontradicted expert testimony which remains unrebutted by any evidence offered on behalf of the Government.

Far from supporting The Tax Court's determination, the indirect evidence relating to the types of shares received by Northrop fully confirms the opinions of petitioners' experts. It is established that restrictions upon the sale of a speculative security may deprive it of fair market value.

Stock in a hazardous, speculative and uncertain undertaking was held to be without fair market value in *Tex-Penn Oil Co. v. Commissioner* (3 Cir.), 83 F. 2d 518, reversing the Board of Tax Appeals. The Supreme Court affirmed the Court of Appeals in *Helvering v. Tex-Penn Oil Co.* (1937), 300 U. S. 481. There the Com-

pany's bankers required the stockholders to agree not to sell or dispose of their stock for a 90 day period, which was renewable at the bankers' option for another 90 days. The Court of Appeals said (p. 523):

“The determination of the value of the stock on August 1, 1919, was a mere speculative guess and a three or six months' restriction on its sale makes the guess wilder and more speculative.”

To the same effect are *State Street Trust Co. v. U. S.* (D. Mass., 1941), 37 Fed. Supp. 846, affirmed *sub. nom. U. S. v. State Street Trust Co.* (1 Cir.), 124 F. 2d 948; *Propper v. Commissioner* (2 Cir.), 89 F. 2d 617; *Schuh Trading Company v. Commissioner* (7 Cir.), 95 F. 2d 404.

In this case the promotional stock was highly speculative and hazardous, the company new and untried. Even the unrestricted Class A shares sold to the public were referred to thus in the prospectus [Ex. 1-A, p. 1]: “These securities are offered as a speculation.” Added to the company's inability to sell more than 5/8 of the stock which was offered to the public [R. 42-44] was the fact that more money was spent in the construction of the plant than had been planned [R. 146.] On the valuation date it had only one contract [R. 91] on which it had made no deliveries and was losing money [R. 96], had no immediate prospects of obtaining additional business [R. 91] and was approaching a financial crisis which it barely succeeded in surmounting. [R. 147.] It is hard to imagine an undertaking that would be any more hazardous, speculative and uncertain, yet have a fighting chance to survive,

than was Northrop Aircraft, Inc. on March 4, 1940. In the light of these circumstances and the restrictions on free marketability of the petitioners' shares the Court was not justified in concluding that their shares had any fair market value.

On top of all this the petitioners' stock was completely subordinated to the publicly owned A shares, by the combination of the articles of incorporation, the Corporation Commissioner's permit and the waivers that were required of petitioners. The calculated effect of these various burdens was to make the value of the promotional stock entirely contingent upon the Company's achieving a sufficient measure of success to make secure the investments of the cash-paying public stockholders. The stock was issued to the organizers as a purely contingent reward for their past services, depending wholly for its value upon the success of their future efforts. These shares were well characterized by the witness Bateman as "a call on stock if the company was successful." [R. 188.]

At March 4, 1940, the Company had not yet achieved that degree of success necessary to give a present value to petitioners' stock. The cumulative effect at that date of the Company's precarious financial condition, the subordinate position of the petitioners' stock and the impediments to its sale, the managerial relation of Northrop to the Company and the 25 cent repurchase option affecting 43 per cent of his stock fully justifies and supports the opinions of the experts and renders The Tax Court's conclusion clearly erroneous.

Conclusion.

For the reasons set forth above the petitioners submit that the judgment of The Tax Court should be reversed and the case remanded with the instruction that petitioners received no taxable income in the year 1940 on account of their stock in the Company.

Respectfully submitted,

O'MELVENY & MYERS,

MAYNARD J. TOLL,

SIDNEY H. WALL and

GEORGE F. ELMENDORF,

By MAYNARD J. TOLL,

Attorneys for Petitioners.

No. 11895

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETE FIAMENGO and NICK MARINKOVICH,

Appellants,

vs.

D/S "SAN FRANCISCO", her engines, tackle, furniture,
apparel, etc., and ANDREW ZAMBERLIN, FIRST DOE and
SECOND DOE, her owners,

Appellees.

APPELLANTS' OPENING BRIEF.

DAVID A. FALL,

388 West Seventh Street, San Pedro, California,

Proctor for Appellants.

MAY 13 1942

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SECOND DOE, her owners,

Appellees.

APPELLANTS' OPENING BRIEF.

Jurisdictional Statement.

This is an appeal in Admiralty from a final decree in favor of respondents in the United States District Court for the Southern District of California, Central Division, in an action for wages and maintenance. Appellants were wrongfully discharged as members of the crew of the D/S "San Francisco" April 22, 1947, although they were employed for the tuna fishing season which commenced in January, 1947, and terminated the latter part of July, 1947.

The pleadings in the District Court were a libel *in rem* and *in personam* for wages and maintenance [Ap. 3]; answer of claimants [Ap. 10].

A trial was had before the United States District Court with the Honorable J. F. T. O'Connor, Judge presiding. After hearing the evidence, oral testimony and written documents, proctors for libelants and respondents argued the case. The Honorable Judge then found in favor of respondents upon all issues.

Findings of fact and conclusions of law were signed and filed November 25, 1947 [Ap. 29].

A final decree was signed on November 24, 1947, and entered November 25, 1947 [Ap. 34].

The apostles on appeal, certified by the clerk of the District Court, included the following: petition for appeal with points and authorities [Ap. 36]; order allowing appeal [Ap. 38]; assignment of errors [Ap. 39]; notice of appeal [Ap. 43], statement of points upon which appellants intend to rely [Ap. 44]; praecipe [Ap. 46]; affidavit and order extending time to file apostles on appeal [Ap. 49-50].

The jurisdiction of the District Court over actions, civil and maritime, involving claims for maintenance and cure and damages, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil cause of Admiralty and maritime jurisdiction.

Jurisdiction of civil causes of Admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, Chapter 20, Sections 9, 11; Stat. L. 76, 78; 28 U. S. C. A. Section 371.

Appeals from final decrees in Admiralty are authorized by Section 128-a of the Judicial Code, as amended May 9, 1942 (56 Stat. L. 272, 28 U. S. C. A. Section 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review by appeal, final decisions.

Statement of the Case.

In January, 1947, appellants were employed as fishermen on board the D/S "San Francisco" at the port of Los Angeles, State of California, for the ensuing tuna fishing season [Rep. Tr. 180]. On April 22, 1947, without any just cause, the appellants' employment on the D/S "San Francisco" was terminated by Andrew Zamberlin, the fish boss and part owner of the D/S "San Francisco" [Rep. Tr. 65, 66, 95, 116, 117, 124, 134, 154].

Had the appellants remained as members of the crew of said vessel until the said vessel was sold in July, 1947, each would have received a gross sum of \$2,632.65, less withholding and social security taxes, for their services from April 22 to July, 1947 [Rep. Tr. 83]. Appellants were unable to obtain remunerative employment from April 22, until July 7, 1947 [Rep. Tr. 69, 82, 90, 91, 121].

At Navidad Bay, Mexico, about one hundred miles south of the United States border, in the middle of March, 1947, appellants, with the knowledge of the Captain and ship boss of the D/S "San Francisco", remained ashore from eleven o'clock p. m. until about four forty or four forty-five o'clock a. m. the following morning [Rep. Tr. 5, 11, 12, 17, 18, 19, 25, 34, 61, 62, 87, 88, 110, 176].

On April 22, 1947, appellants were discharged without explanation [Rep. Tr. 65, 66, 95, 116, 117, 124, 134, 154].

From the evidence, the District Court concluded that libelants were entitled to receive nothing.

Assignment of Errors.

The assignment of errors upon which the appellants rely are set forth in the appendix to this brief, and are summarized in the following statement of points involved in this appeal.

a. The District Court erred in finding and concluding that the conduct of the libelants constituted valid grounds for their discharge.

b. The District Court erred in finding and concluding that libelants were entitled to no part of what they would have earned had they remained as members of the crew of the D/S "San Francisco" from April 22, until July 7, 1947.

c. The District Court erred in not awarding to each of the libelants the sum of \$2,632.65 for wages, less withholding and social security taxes.

d. The District Court erred in finding and concluding that libelants were not entitled to receive their maintenance from the date of their discharge until they were able to again obtain remunerative employment.

e. The District Court erred in not finding and concluding that the libelants were entitled to receive maintenance in the sum of \$5.00 per day from April 22 to July 6, 1947, inclusive.

Outline of Argument.

I. This appeal is a trial *de novo*.

II. Appellants were wrongfully discharged.

III. Appellants are entitled to recover the sum of \$2632.65 each, less withholding and social security taxes, as wages.

IV. Appellants are entitled to recover the sum of \$375.00 each for maintenance, from April 23, to July 6, 1947, inclusive.

ARGUMENT.

I.

This Appeal Is a Trial De Novo. No Authority Is Necessary to Establish This Point in the Ninth Circuit.

II.

Appellants Were Wrongfully Discharged.

The evidence is without conflict that on the evening the "San Francisco" was at Navidad Bay, Mexico, most all of the crew of the D/S "San Francisco", and some of the crew of the "St. James" went ashore in the power boat of the D/S "San Francisco", and returned to their respective ships by the same power at about eleven to eleven-thirty o'clock the same evening [Rep. Tr. 11, 26, 27, 72, 73, 77]. The Captain and the fish boss of the D/S "San Francisco" knew that appellants were going to remain ashore that evening and made no objection thereto at any time [Rep. Tr. 18, 25, 61, 62, 63, 88, 132, 176]. Appellants were instructed by the Captain or fish boss to return aboard the D/S "San Francisco" by seven o'clock a. m. [Rep. Tr. 18, 25, 62, 88, 111, 175, 176]. As a matter of fact, appellants returned prior to five o'clock a. m. [Rep. Tr. 11, 12, 17, 19, 25, 34, 62, 192, 112].

On April 22, 1947, without any cause whatsoever being given for the termination of their employment, appellants were advised by the fish boss that they were fired, although they were good workers [Rep. Tr. 93, 95, 116, 117, 124].

No reason was given for the discharge of appellants until the answer to the libel was filed in this action in the United States District Court.

A seaman may not ordinarily be dismissed for a single fault unless the same is of a highly aggravated character or circumstances show him to be an unsafe and unfit man to have aboard the vessel.

Villa Y. Herman, 101 Fed. 132.

Most cases arising from wrongful discharge seem to have arisen out of discharges in foreign ports, but the rule as set down in those cases recognize the general admiralty rule to be identical.

Donna Lane, 299 Fed. 977 (D. C. Wash. 1924);

Alaska SS Co. v. Gilbert, 236 Fed. 715.

Also, it is the general rule that a discharge may not be effected because of a little infraction of discipline, nor because of one act of disobedience.

The Superior, 22 Fed. 927;

The Idle Hour, 63 Fed. 1018;

The Top Gallant, 84 Fed. 356;

Trent v. Gulf Pacific Lines, 42 F. (2d) 903;

Marsland v. The Yosemite, 18 Fed. 331.

III.

Appellants Are Entitled to Recover the Sum of \$2,632.65 Each, Less Withholding and Social Security Taxes, as Wages.

It having been stipulated that the appellants would have earned the gross sum of \$2,632.65 wages, had they remained aboard the D/S "San Francisco" from April 23 until July 7, 1947, there can be no contest as to this item.

The sum of \$26.33 should be withheld as social security taxes and that sum should be paid to the Collector of Internal Revenue by appellees to cover that particular item. Withholding taxes should be deducted from the gross wages in accordance with the law in effect at the time these wages shall be paid.

Where seamen are wrongfully discharged during the course of the voyage, they are entitled to recover for such damages as reasonably and proximately flow from the breach of the contract, but only to the extent that such damages are not reasonably, or could not reasonably have been, recouped by gainful occupation which was available to them.

Sabat v. U. S., 1947 A. M. C. 1152, 72 Fed. Supp. 295.

The claim for the lay or share of what the appellants would have earned is very similar to the occurrence in the case of *The American Beauty*, 295 Fed. 513. Therein, it was held that the fishermen who shipped for the fishing season under an oral contract for a lay and who were wrongfully discharged, are entitled to recover the damages sustained by reason of such discharge, measured by the difference between their lay or share, and their net earnings during the remainder of the season.

IV.

**Appellants Are Entitled to Recover the Sum of \$375.00
Each for Maintenance, From April 23, to July 6,
1947, Inclusive.**

In the event of a wrongful discharge of a seaman, he is entitled to recover maintenance from the date of his discharge until he could or does return to equally lucrative employment. Roscoe's Admiralty Practice, 5th Edition, page 214, citing,

The Elizabeth, 2 Dods. 403;

The Exeter, 2 C. Rob. 261;

The Beaver, 3 C. Rob. 92;

The Camilla, Swa. 312;

The Immacolata Concesione, 5 Asp. 208.

The evidence before the Court is that the first employment offered the appellants was on July 7, 1947 [Rep. Tr. 68, 69, 82, 90, 121]; notwithstanding that they had endeavored to obtain employment continuously from April 23 until said date in July [Rep. Tr. 69, 120].

There is no conflict in the evidence that both appellants, single, paid for their own maintenance during their aforesaid period of unemployment subsequent to their wrongful discharge [Rep. Tr. 69, 70, 122].

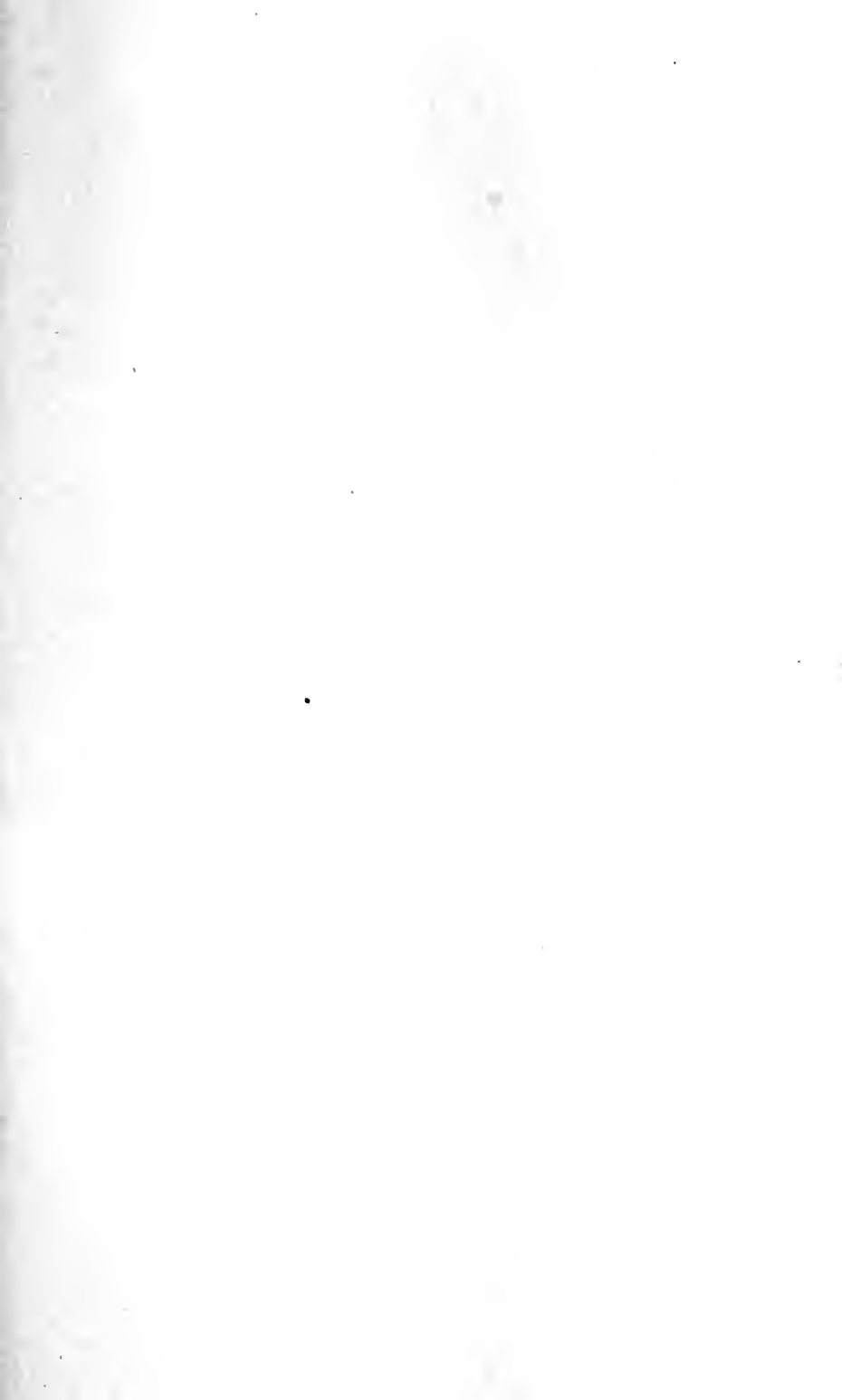
Conclusion.

It is respectfully submitted that the appellants herein are each entitled to recover from appellees the sum of \$2,632.65, less withholding and social security taxes, and the sum of \$375.00 each as maintenance; and that the decree of the United States District Court herein dismissing the libel of appellants should be reversed.

Respectfully submitted,

DAVID A. FALL,

Proctor for Appellants.



APPENDIX.

Assignment of Errors.

I.

The District Court erred in finding that there was no permission given to the libelants to remain ashore at Navidad Bay, Lower California, Republic of Mexico, on a night in March, 1947.

II.

That the District Court erred in finding that the libelants were required to be aboard the "San Francisco" at any time prior to 4:45 a. m. on the morning said vessel was at Navidad Bay, Lower California, Republic of Mexico.

III.

That the District Court erred in finding that no permission was given by the Master, Nick Zamberlin, or the managing owner, Andrew Zamberlin, to the libelants, or either of them, to remain ashore.

IV.

That the District Court erred in finding that while the "San Francisco" was at Navidad Bay, both of the libelants were disobedient to the orders of the managing owner, Andrew Zamberlin, and the Master, Nick Zamberlin.

V.

The District Court erred in finding that there was good cause to discharge both of the libelants for their alleged acts and failure to act in accordance with the orders given at Navidad Bay by the managing owner, Andrew Zamberlin, and the Master, Nick Zamberlin.

VI.

That the District Court erred in finding that neither of the libelants were entitled to any sum or sums of money from and after the 22nd day of April, 1947, either as compensation as crew members or for maintenance.

VII.

That the District Court erred in not finding that the libelants were unlawfully discharged.

VIII.

That the District Court erred in not finding that the libelants were entitled to wages from the 22nd day of April, 1947, to and including the 7th day of July, 1947.

IX.

That the District Court erred in not finding the libelants were entitled to their maintenance while ashore after their unlawful discharge on April 22nd, 1947, to and including the date they reasonably could have returned to remunerative employment.

X.

That the District Court erred in finding that the discharge of the libelants and both of them, on or about April 27, 1947, was lawful.

XI.

That the District Court erred in concluding that the respondents and claimants are entitled to judgment against the libelants for their costs and expenses incurred or expended herein.

No. 11895

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PETE FIAMENGO and NICK MARINKOVICH,

Appellants,

vs.

D/S "SAN FRANCISCO," her engines, tackle, furniture,
apparel, etc., and ANDREW ZAMBERLIN, FIRST DOE and
SECOND DOE, her owners,

Appellees.

APPELLEES' ANSWERING BRIEF.

FILE

JUN 11 1948

ARCH E. EKDALE and

GORDON P. SHALLENBERGER,

614 South Pacific Avenue, San Pedro,

Attorneys for Appellees.



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apparel, etc., and ANDREW ZAMBERLIN, FIRST DOE and
SECOND DOE, her owners,

Appellees.

APPELLEES' ANSWERING BRIEF.

Jurisdictional Statement.

Appellees do not question the jurisdiction of the United States Circuit Court of Appeals; however, it is noted that in the first paragraph of Appellants' Jurisdictional Statement the following appears: "Appellants were wrongfully discharged as members of the crew of the D/S 'SAN FRANCISCO' April 22, 1947, . . ." This statement, of course, is contrary to the findings and is denied by the Appellees.

Statement of the Case.

In January, 1947, Appellants were employed by Andrew Zamberlin, then Master, and at all times Managing Owner and fish boss of the D/S "SAN FRANCISCO." There is no testimony as to the term of their employment, although Libelants Exhibit "2," which was received in evidence after the close of Appellants case, and without any foundation or identification [Rep. Tr. pp. 179, 180], indicates that the employment was for the season.

Sometime around the middle of March, 1947, while at Navidad Bay, Mexico, waiting for the weather to clear [Rep. Tr. p. 46; Clk. Tr. p. 31, Finding VII], a party of the fishermen from the D/S "SAN FRANCISCO" and another vessel, the "ST. JAMES," also anchored in Navidad Bay, went ashore early in the evening. The Appellants, Nick Zamberlin, the Master of the D/S "SAN FRANCISCO," Andrew Zamberlin, the fish boss and Managing Owner of the D/S "SAN FRANCISCO" were among the party.

Prior to departure, Andrew Zamberlin and the Master of the "ST. JAMES" had a discussion in the presence of the Appellants as to when the party should return to the vessels [Rep. Tr. pp. 73, 142, 143]. The substance of the discussion was that they should remain two or three hours and all return together.

When the party reached shore, they entered a small open air or partially enclosed Cantina where they partook of beer. At about 11:00 P. M. the Managing Owner and fish boss, admittedly the person who gave all orders aboard

the D/S "SAN FRANCISCO" [Rep. Tr. pp. 21, 85, 86, 123, 124, 140], and the Master of the "ST. JAMES," stated in a loud voice, "Let's go" [Rep. Tr. pp. 75, 144, 145, 174]. The Appellants could not have failed to hear the command, and the Honorable District Court found that they did hear it [Clk. Tr. p. 31, Finding IX; Rep. Tr. pp. 123, 144, 145, 174]. The Appellants did not receive permission from anyone to stay ashore [Rep. Tr. pp. 132, 133, 158; Clk. Tr. p. 31, Finding X].

The Appellants remained ashore and A. W. O. L. from the vessel until approximately 5:00 A. M. the following day.

The vessel proceeded to San Pedro, discharged its cargo and went into drydock for repairs. After the vessel was again ready to sail, the Appellants came back aboard and they were informed by the fish boss and Managing Owner, with the consent of the Master, that they were discharged. No protest was made by the Appellants [Rep. Tr. pp. 66, 95] and although there is some question as to exactly what was said at the time of discharge there is no question that the Appellants and all other parties concerned were aware of the reason for discharge, to wit, the absent without leave at Navidad Bay, for the very next day, April 23, 1947, the Appellants went to their Union and had the statement executed which is in evidence as Libelants' Exhibit "1," and which statement in its opening paragraph indicates their knowledge.

Outline of Answering Argument.

Appellees, in their Answering Argument, will follow the outline set out by the Appellants.

ARGUMENT.

I.

This Appeal Is a Trial De Novo.

Although we still have the theory that an Admiralty Appeal is a trial *De Novo*, the various Circuits have uniformly limited the practice of the mentioned theory to a review of the evidence and will not disturb the findings of the District Court unless they are found to be clearly against the weight of evidence.

Petterson Lighterage & T. Corp. v. New York Central R. Co., 126 F. (2d) 992.

In the above case, Circuit Judge L. Hand, on pages 997 and 998, reviews the opinions of all Circuits upon the subject.

II.

Appellants Were Not Wrongfully Discharged.

The evidence shows that the Appellants upon the evening they went ashore in Navidad Bay knew they were to return in company with all of the others in the party: otherwise, why would they testify that they asked permission to remain ashore? [Rep. Tr. p. 61].

It is without dispute that the fish boss and Managing Owner, Andrew Zamberlin, gave all the orders to the crew of the D/S "SAN FRANCISCO" [Rep. Tr. pp. 21, 85, 86, 123, 124, 140] and the District Court so found [Clk. Tr. p. 30, Finding VI]. It is also without dispute that Andrew Zamberlin gave orders to return to the ship at about 11:00 P. M. [Rep. Tr. pp. 42, 73, 75, 144, 145, 174] and the Court so found [Clk. Tr. p. 31, Finding VIII].

It is beyond serious question that the Appellants heard the order [Rep. Tr. pp. 123, 144, 145, 174], and saw everyone leaving in response thereto, and they both testify that they asked the Master permission to stay ashore [Rep. Tr. p. 61] thereby proving that they knew they were supposed to return to the ship. Permission to stay ashore was never asked of the Managing Owner and fish boss, Andrew Zamberlin, neither was it given by the Master, although the testimony is in direct conflict on the latter; however, the Court, after hearing all the testimony and observing the witnesses, found not only that they heard the order, but that no permission to stay ashore was given by anyone [Clk. Tr. p. 31, Findings IX and X].

There was, therefore, a wilful and serious infraction of discipline on the part of the Appellants, made even more serious by reason of the fact that the vessel involved was a fishing boat and as such has no set sailing time and must take advantage of the weather [Rep. Tr. p. 40]. This the Appellants well knew [Rep. Tr. pp. 89, 90]. It is further borne out by the fact that soon after the Appellants were aboard, to wit, prior to 6:00 o'clock A. M., the vessel put to sea [Rep. Tr. pp. 8, 37]. This latter in and of itself makes questionable the story of the Appellants who each testified that the Master told them that it was O. K. to stay ashore as long as they got back at 7:00 o'clock A. M. The Court had an opportunity to observe the Appellants, who both testified, and their manner and appearance, which would aid in determining the wilfulness, and the seriousness of the possible effect the action of these men could have on the rest of the crew, and the success of the vessel's enterprise, and the Court was entirely correct in finding that the act was sufficiently serious to warrant the discharge of Appellants.

The Appellants make a point of the fact that no reason was given for the termination of their employment. There can be no real question but what the Appellants fully understood, whether it was voiced or not, the reason for their discharge. The evidence shows that they did not question the order, and as has heretofore been pointed out, Libelants Exhibit "1" executed the day following their discharge shows clearly that they knew why they were discharged.

Appellants cite several cases as authority for the fact that a seaman may not *ordinarily* (italics ours) be dismissed for a single fault unless the same is of a highly aggravated character, or circumstances show him to be an unsafe and unfit man to have aboard the vessel. The cases cited, however, are distinguishable:

The "Villa Y. Herman," 101 Fed. 132.

This was a case where the Mate was drunk and going around on all fours, and there was considerable indication that the Captain was also drunk. Libelants had been hired and signed on by an agent of the Master; there was conflict as to whether the Master had given certain orders with regard to a tow line. The orders, if given, were not fulfilled, but it was questionable as to whose duty it was to fulfill them. Under such circumstances, the Court found that the discharge was not justified. The vessel was not a fishing vessel and the acts or omissions were not clear cut and certainly under circumstances far different from the instant case.

The "Donna Lanc," 299 Fed. 977.

In this case there was a dispute as to whether certain work was required of the Libelants. Court found that

the Libelants were required to do the work, but that the circumstances of their not doing it was not serious, and the Court, in deciding the case, stated:

“a single wilful disobedience of a lawful command, *at least one no more aggravated* (italics ours) than that in the present case, would not warrant, without his consent, the discharge of a seaman before the termination of the voyage.”

This was not a fishing vessel and the acts or omissions in no sense comparable to the instant case.

Alaska SS Co. v. Gilbert, 236 Fed. 715.

In this case there was a dispute as to the hours at which a seaman was to go on watch. An argument developed as to whether the seaman was to receive overtime; the seaman, however, did not refuse to go on watch, but did his duties and followed orders. A Court held that his discharge was unjustifiable. Comment is unnecessary to distinguish such a case from the instant case.

The “Superior,” 22 Fed. 927.

This case was decided on the question as to whether the Libelant should have been discharged in a foreign port without funds, etc., and has no bearing whatsoever on the situation such as exists here.

The “Idle Hour,” 63 Fed. 1018.

This case was solely an argument over whether the seaman was hired by the day or the month and has no bearing whatsoever upon the instant case.

The "Top Gallant," 84 Fed. 356.

This case is not applicable by reason of the fact that the services were terminated by mutual consent, and the only point of the case was as to the forfeiture of *past* wages by reason of desertion. There is no question of past wages in the instant case; the Appellants have been paid up to and including the date of discharge.

Trent v. Gulf Pacific Lines, 42 F. (2d) 903.

This case is not in point inasmuch as it is a question of rights under Ship's Articles, and the Court seemed to feel that there was power under Ship's Articles, and the maritime laws applying thereto, for the Captain to have disciplined the Libelant instead of discharging him.

In the instant case, we have a fishing vessel where the men do not ship under Articles, and where they are governed by a Union Agreement, and *there exists no method of punishment for the acts of Appellants in the instant case, save discharge*, or a questionable voluntary submission of all parties to the decision of a shoreside grievance committee [see Libelant's Exhibit "2"]. The foregoing being true, a disciplinary breach such as Appellants committed becomes considerably more serious than when shipping under Articles.

Marsland v. "Yosemite," 18 Fed. 331.

This was a case where a dispute arose between a yacht owner and the Chief Engineer regarding the cleaning of certain portions of the ship. The Court held that the Engineer's conduct was negligent and blamable, but not "in any way endangering the safety *or discipline* (italics ours) of the ship." In other words, the ship was not

at sea and the infraction of orders was not in any way serious as compared to the instant case.

Being absent without leave is sufficient justification for discharge.

The "Cripple Creek," 52 Fed. Supp. 710, at pages 712, 713.

"While seamen should be afforded every protection with respect to their status by reason of the hazards of their calling and while the law has jealously surrounded them with every possible safeguard, it is not to be assumed that wrongful conduct on their part is in any wise to be condoned."

* * * * *

"It seems to me it would be a singularly odd rule of law, contended for by the libellants, which would permit them, though not actually deserters, but merely having the status of absent without leave, to be able to hold up the sailing of the ship, and to compel the Master to come back to port, and have their alleged grievances arbitrated by the Commissioner there, and upon his refusal so to do, they could be visited only with a two day deduction of wages and yet be able to claim wages to the end of the voyage."

This was, of course, a case where the men shipped under Articles, and there is raised the point that they could be punished in some other fashion than discharge; however, we believe that the language just quoted is significant and bears upon the instant case.

Buchanan v. United States, 24 F. (2d) 528.

In this case the seamen were absent without leave and the Court held that while they were not deserters, their

discharge was justifiable by reason of their absence without leave, and that the Master was even justified in leaving port without them.

The "Nereid," 67 Fed. 602.

The "*Nereid*" was a fishing vessel, and certain of the fishermen asked permission to go ashore; permission was given and they were instructed to return upon signal. An hour later the Master sounded a signal to return (which would be comparable to the order "Let's go" in the instant case). The men did not return, and the ship sailed without them. The men sued to recover wages and damages, the wages being shares. The court not only did not allow them damages, but deducted sufficient from their shares to compensate the vessel for their failure to perform their duty. The question of future wages or employment was not involved.

III.

Appellants Are Not Entitled to Recover Any Wages.

The amount of earnings that Appellants would have earned had they been permitted to remain aboard the vessel and fish is as recited in Appellants' Brief.

For the Appellants to recover, however, the Honorable District Court must be reversed and the Appellants be held to have been unlawfully discharged.

It is not believed that the citation of authority for the foregoing is necessary.

IV.

Appellants Are Not Entitled to Recover Maintenance.

The evidence is not in conflict to the effect that both of the Appellants retained a room the year round, whether at sea or not; hence, it is the contention of the Appellees that even though the District Court were reversed as to the justification for the discharge, no maintenance allowance should be made for housing, if the Appellants are granted their full share, and it is respectfully submitted that it would be an injustice to grant the full share of \$2,632.65 (less withholding tax), from which there is not made the deduction for groceries, and in addition thereto give some \$5.00 a day for maintenance. This, in effect, would be allowing \$5.00 a day for food in addition to the grocery money included in the gross share.

Conclusion.

It is respectfully submitted that the Findings of the District Court were supported by the evidence, and that the Conclusions of law based thereon were correct, and that the judgment of the lower Court should be affirmed *in toto*.

ARCH E. EKDALE and
GORDON P. SHALLENBERGER,
Attorneys for Appellees.

No. 11896

United States
Circuit Court of Appeals
For the Ninth Circuit

RAYMOND M. NAYLOR,

Appellant,

vs.

WEST CONSTRUCTION COMPANY, a Corporation, and UNITED STATES OF AMERICA,

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

JUL - 2 1948

PAUL P. O'BRIEN,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit

RAYMOND M. NAYLOR,

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NAMES AND ADDRESSES OF COUNSEL

MESSRS. OSCAR A. ZABEL, and
FREDERICK PAUL

of Messrs. Zabel, Poth & Paul,
518 Fourth and Pike Bldg.,
Seattle 1, Washington,
Attorneys for Appellant.

MR. MAURICE R. McMICKEN,

827 Central Building,
Seattle 4, Washington,

Attorney for Appellee West Construction
Company, a Corporation.

MESSRS. J. CHARLES DENNIS and
FRANK PELLEGRINI,

1017 U. S. Court House,
5th and Spring,
Seattle, Washington,

Attorneys for Appellee United States of
America. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY, a
Corporation,

Defendant.

COMPLAINT

I.

Plaintiff brings this action to recover from the defendant unpaid overtime compensation, and an additional equal amount of liquidated damages on his own behalf, and he also brings this action as assignee on behalf of the other employees, and former employees of the defendant similarly situated, as hereinafter alleged in the various causes of action; that he also brings this action on behalf of other employees, and former employees similarly situated, who may hereafter join in this action, all pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 728, 75th Congress; 52 Stat. 1060), hereinafter referred to as the Act.

II.

Jurisdiction is conferred on the Court by Section 14 (8), 28, U. S. C. A. (Judicial Code) 24, giv-

ing the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," without regard to the citizenship of the parties, or the value or sum, in controversy, and by Section 16 (b) of the Act.

III.

That the defendant, West Construction Company, is a Massachusetts [2] corporation, and qualified to do business in the State of Washington; and, that said defendant, West Construction Company, was, and now is, engaged in the purchasing and using, selling and furnishing of materials, equipment, services and supplies in interstate commerce for the building of camps, tunnels, docks and bases in the Territory of Alaska; that the material, equipment and supplies were purchased at various places, both within and without the Territory of Alaska and the State of Washington, and shipped in interstate commerce to Alaska for use; that substantially all of said materials, equipment and supplies were produced for interstate commerce, and have been purchased, sold, offered for transportation, transported, shipped or delivered in interstate commerce from various points within and without the State of Washington and other States to Alaska, and from Alaska to other States.

IV.

That during the work weeks beginning 1943 to this date, defendant has employed a large number of men and women in the buying, selling and transporting of said materials, equipment, services and

supplies in Alaska, doing clerical, office, bookkeeping and accounting work necessary for the buying, selling and transporting of said materials, equipment, services and supplies, and in keeping payrolls and other records of other employees located in the Territory of Alaska, all in interstate commerce; that during said period, the defendant, who is engaged in the buying, selling and transporting of goods in interstate commerce, or engaged in operations necessary to the production of goods for interstate commerce within the meaning of the Act, employed the plaintiff, and other employees, and former employees who are similarly situated, who may hereafter join in this suit, to perform duties constituting an essential part of the handling and the buying, selling and transporting in interstate commerce of defendant's goods without [3] compensating them for overtime as provided by said Act; that the goods and services, purchased, sold and transported by such employees, during such period, have been produced for interstate commerce and have been sold, offered for transportation, transported, shipped or delivered in interstate commerce from various points within the various States of the United States to Alaska, and to and from the scene of operations where the plaintiff and said employees were employed.

V.

That in such business the defendant has employed the plaintiff, and the other named employees, in the various duties, and for the time described in their

various causes of action hereinafter alleged; and, that the functions performed by the plaintiff, and the other named employees, are an essential part of the handling, selling and transporting of defendant's goods, and they were transported and delivered in interstate commerce; and, that the performance of such duties constitute engaging in commerce within the meaning of the Act.

VI.

That during such period, defendant employed plaintiff, and other named employees, and other employees similarly situated, in the buying, selling, handling and transporting, or in occupations necessary to the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act for work weeks longer than the applicable maximum number of hours under Section 7 of the Act, and failed and refused to compensate them and said other employees, and former employees for such employment in excess of the applicable maximum hours under Section 7 of the Act, without compensating them for such excess hours at rates not less than one and one-half times the regular hourly rates at which they were, or are, employed, was in violation of Section 7 of the Act.

VII.

That during the periods alleged in the various causes of action herein, defendant employed the plaintiff, and other employees, and former employees, hereinafter named, and hereafter to be named, in its said operations, as aforesaid, in excess

of forty hours during each work week and paid wages to the plaintiff, and other employees, on the basis of a straight hourly rate for all hours worked per week; that under the provisions of Section 7 of the Act, plaintiff, and other named employees, and former employees, should have received an additional one-half time for all overtime hours worked each week, exclusive of the 7th day, and therefore should have received not less than the rate of time and one-half of their regular hourly rate of pay for all overtime hours worked in such work weeks.

VIII.

That from March 1, 1944, to and including, August 18, 1945, the defendant employed the plaintiff, Raymond M. Naylor, under the classification of Assistant Personnel Manager, performing duties pertaining to the hiring and clearing of men for employment and shipment to Alaska, meeting trains for incoming men, checking baggage and accompanying men to outgoing ships, meeting incoming ships for returning men, and assisting in clearing them, checking their baggage and accompanying men to outgoing trains, making arrangements for transportation to Seattle, making reservations on ships from Seattle to the Aleutians, and making arrangements for executives of the defendant to travel in various parts of the United States and Alaska, all in connection with the interstate commerce operations and transactions as alleged in paragraphs III to VII, inclusive, and who is also engaged in an occupation necessary to the move-

ment of goods in interstate commerce; and, that as such employee the plaintiff was engaged in interstate commerce, or in the production of goods for interstate commerce, within the meaning [5] of the Fair Labor Standards Act of 1938; and, that he worked regularly from March 1, 1944, to and including August 18, 1945, and by reason thereof the defendant became indebted to the plaintiff for a total of twenty-two hundred fifty overtime hours at the time and one-half rate, as alleged in paragraph VII, but that the said defendant, the employer, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was employed, and by reason thereof, the defendant became indebted to the said Raymond M. Naylor in the sum of \$2492.50, no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of said action; that the sum of \$1250.00 is a reasonable attorney's fee on said plaintiff's cause of action.

And, for a Second Cause of Action Against the Defendant, Plaintiff claims and alleges, as follows:

I.

Repeats and realleges, as though fully set forth

herein, paragraphs I to VII, inclusive, of the first cause of action.

II.

That from February 12, 1944, to and including, May 5, 1945, the defendant employed the claimant, Richard T. Irby, under the classification of an Employee's Relations Advisor, performing duties pertaining to the making of recommendations for approval of appointments for employees in the Seattle Office, maintaining balance between contractors with respect to employees' salaries, and making recommendations for adjustments in same, and making recommendations for adjustment of employee's complaints and grievances, [6] and other incidental matters pertaining thereto, all in connection with the interstate commerce operations and transactions as alleged in paragraphs III to VII, inclusive, and who is also engaged in an occupation necessary to the movement of goods in interstate commerce; and, that as such employee the claimant was engaged in interstate commerce, or in the production of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938; and, that he worked regularly from February 12, 1944, to and including May 5, 1945, and by reason thereof the defendant became indebted to the claimant for a total of two hundred fifty-six overtime hours at the time and one-half rate, as alleged in paragraph VII, but that the said defendant, the employer, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was

employed, and by reason thereof, the defendant became indebted to the said Richard T. Irby in the sum of \$659.60, no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of said action; that the sum of \$350.00 is a reasonable attorney's fee on said claimant's cause of action.

III.

That the said Richard T. Irby has, in writing, assigned his said cause of action to the plaintiff herein, for the purpose of representing him in this suit and for the purpose of receiving and collecting on his behalf any judgment that might be obtained herein.

And, for a Third Cause of Action Against the Defendant, Plaintiff claims and alleges, as follows:

I.

Repeats and realleges, as though fully set forth herein, paragraphs I to VII, inclusive, of the first cause of action.

II.

That from January 7, 1944, to and including, April 29, 1945, the defendant employed the claimant, Stuart Hamilton Johnston, under the classifi-

cation of a Chief Expediter, performing duties pertaining to the expediting of materials from the suppliers to the Aleutians, assisting in the work of various employees in the Traffic Department, and other incidental duties pertaining thereto, all in connection with the interstate commerce operations and transactions as alleged in paragraphs III to VII, inclusive, and who is also engaged in an occupation necessary to the movement of goods in interstate commerce; and, that as such employee the claimant was engaged in interstate commerce, or in the production of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938; and, that he worked regularly from January 7, 1944, to and including April 29, 1945, and by reason thereof the defendant became indebted to the claimant for a total of two hundred seventy-six overtime hours at the one-half time rate, as alleged in paragraph VII, but that the said defendant, the employer, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was employed, and by reason thereof, the defendant became indebted to the said Stuart Hamilton Johnston in the sum of \$238.20, no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs [8]

of said action; that the sum of \$150.00 is a reasonable attorney's fee on said claimant's cause of action.

III.

That the said Stuart Hamilton Johnston has, in writing, assigned his said cause of action to the plaintiff herein, for the purpose of representing him in this suit and for the purpose of receiving and collecting on his behalf any judgment that might be obtained herein.

And, for a Fourth Cause of Action Against the Defendant, Plaintiff claims and alleges, as follows:

I.

Repeats and realleges, as though fully set forth herein, paragraphs I to VII, inclusive, of the first cause of action.

II.

That from March 5, 1944, to and including, December 30, 1944, the defendant employed the claimant, Francis M. Watson, under the classification of a Recruiter, performing duties connected with, or pertaining to the hiring and clearing of men for employment and shipment of men to the Aleutians, including the meeting of trains for incoming men, checking baggage, and accompanying men to outgoing ships, meeting incoming ships for returning men, assisting in clearing them, checking baggage, and accompanying men to outgoing trains, and other incidental duties pertaining thereto, all in connection with the interstate commerce operations and transactions as alleged in paragraphs III to

VII, inclusive, and who is also engaged in an occupation necessary to the movement of goods in interstate commerce; and, that as such employee the claimant was engaged in interstate commerce, or in the production of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938; and, that he worked regularly from March 5, 1944, to and including December 30, 1944, and by reason [9] thereof the defendant became indebted to the claimant for a total of fifteen hundred five overtime hours at the one-half time rate, as alleged in paragraph VII, but that the said defendant, the employer, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was employed, and by reason thereof, the defendant became indebted to the said Francis M. Watson in the sum of \$1075.86, no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of said action; that the sum of \$550.00 is a reasonable attorney's fee on said claimant's cause of action.

III.

That the said Francis M. Watson has, in writing, assigned his said cause of action to the plaintiff herein, for the purpose of representing him in

this suit and for the purpose of receiving and collecting on his behalf any judgment that might be obtained herein.

Wherefore, Plaintiff prays for judgment against the defendant as follows:

1. On his first cause of action for the sum of \$4985.00, together with attorney's fees in the sum of \$1250.00;
2. On his second cause of action for the sum of \$1319.20, together with attorney's fees in the sum of \$350.00;
3. On his third cause of action for the sum of \$476.40, together with attorney's fees in the sum of \$150.00;
4. On his fourth cause of action for the sum of \$2151.72, together with attorney's fees in the sum of \$550.00; [10]
5. And, for plaintiff's costs and disbursements herein to be taxed.

OSCAR A. ZABEL,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 29, 1946. [11]

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES

Comes now the defendant West Construction Company, a corporation, and for answer to the

Complaint of the plaintiff herein, admits, denies and alleges as follows:

As to First Cause of Action:

I.

For answer to Paragraph I, admits plaintiff herein is bringing this action to recover overtime compensation and liquidated damages and states that it does not have sufficient knowledge or information concerning the other allegations contained in paragraph I upon which to form a belief as to the truth thereof and therefore denies the same.

II.

For answer to paragraph II. admits each and every allegation therein contained.

III.

For answer to paragraph III, admits that defendant is a Massachusetts corporation qualified to do business in the State of Washington, and denies each and every other allegation therein contained.

IV.

For answer to paragraph IV, admits the plaintiff and the other employees named in the various causes of action were [12] employees of defendant during the dates hereinafter in this answer specified and denies each and every other allegation therein contained.

V.

For answer to paragraph V, admits the plaintiff and the other employees named in the various

causes of action were employees of defendant during the dates hereinafter in this answer specified and denies each and every other allegation therein contained.

VI.

For answer to paragraph VI, denies each and every allegation therein contained.

VII.

For answer to paragraph VII, denies each and every allegation therein contained.

VIII.

For answer to paragraph VIII, admits that from April 4, 1944, to August 11, 1945, inclusive, defendant employed plaintiff Raymond M. Naylor as Assistant Personnel Manager, and denies each and every other allegation therein contained.

As to All Subsequent Causes of Action:

I.

In each and every cause of action set forth in the Complaint wherein paragraphs I to VII, inclusive, of the First Cause of Action are referred to by reference, the answer of defendant thereto is the same as to the corresponding paragraphs of the First Cause of Action. As to each of the Causes of Action, as set forth in the Complaint, exclusive of the First, defendant states it does not have sufficient knowledge or information upon which to form a belief as to whether the employees therein named have assigned their causes of action to the plaintiff and therefore [13] denies said allegations and calls

upon the plaintiff to file with the Clerk of the Court the written assignments of said claims.

Referring to the other allegations of the several Causes of Action, defendant admits, denies and alleges as follows:

As to the Second Cause of Action:

I.

For answer to paragraph II of the Second Cause of Action, as set forth in plaintiff's Complaint, admits that between February 16, 1944, and April 30, 1945, inclusive, defendant employed Richard T. Irby as Employee's Relations Advisor, and denies each and every other allegations therein contained.

As to the Third Cause of Action:

I.

For answer to paragraph II of the Third Cause of Action, as set forth in plaintiff's Complaint, admits that between January 10, 1944, and August 27, 1944, inclusive, defendant employed Stuart Hamilton Johnson as Expediter and as Chief Expediter between August 28, 1944, and April 30, 1945, inclusive, and denies each and every other allegation therein contained.

As to the Fourth Cause of Action:

I.

For answer to paragraph II of the Fourth Cause of Action, as set forth in plaintiff's Complaint, admits that between March 10, 1944, and December 30, 1944, inclusive, defendant employed Francis

M. Watson as Recruiter, and denies each and every other allegation therein contained.

By way of further Answer to the several Causes of Action as set forth in the Complaint herein, and as Affirmative Defenses thereto, defendant alleges:

I.

That each and all of the employees named in the several [14] Causes of Action, as set forth in the Complaint herein, during their employment by defendant were employed in a bona fide executive or administrative capacity and hence not subject to and are within the exemptions of the Fair Labor Standards Act of 1938, as amended.

II.

That none of the employees referred to in the several Causes of Action, as set forth in the Complaint herein, were engaged in commerce or in the production of goods for commerce while in the employ of the defendant and therefore were not subject to the Fair Labor Standards Act of 1938, as amended.

III.

That all of that part of the claims of the plaintiff and the assignors of the plaintiff accruing prior to two (2) years before January 29, 1946, the date of commencement of this action is barred by Section 165 of Remington's Revised Statutes of the State of Washington, both as to overtime compensation and liquidated damages.

IV.

That plaintiff Raymond M. Naylor, during the period May 2, 1945, to July 26, 1945, inclusive, and during the period July 31, 1945, to August 9, 1945, inclusive, was employed on temporary duty at Prince Rupert, British Columbia, Canada, and that any work performed for defendant by said Raymond M. Naylor during said two periods while outside the territorial jurisdiction of the United States was not subject to the provisions of the Fair Labor Standards Act of 1938, as amended.

Wherefore, having fully answered the Complaint of plaintiff herein, defendant prays that this action may be dismissed with prejudice and that it may recover its costs herein.

MAURICE R. McMICKEN,
Attorney for Defendant.

Copy received 3/15/47.

/s/ OSCAR A. ZABEL.

[Endorsed]: Filed March 7, 1947. [15]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF
DEFENDANT

Comes now the defendant West Construction Company, and for amendment to the Answer and Affirmative Defenses of said defendant heretofore filed herein, and as additional affirmative defenses to the Complaint of plaintiff herein, alleges:

V.

That all contracts of employment between the plaintiff and defendant and between each of the assignor claimants and defendant, and wages and salaries paid thereunder were approved and paid in good faith by this defendant in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of said United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendant belongs.

VI.

That any act or omission of defendant under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff or any of the assignor claimants herein, was in good faith and in the reasonable belief on the part of defendant [16] that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended.

MAURICE R. McMICKEN,

Attorney for Defendant.

Copy received June 16, 1947.

ZABEL, POTH & PAUL,

By /s/ FREDERICK PAUL,

Atty. for Plaintiffs.

[Endorsed]: Filed Sept. 9, 1947. [17]

[Title of District Court and Cause.]

Court Room No. 1, Monday, December 29, 1947

Presiding: Honorable John C. Bowen.

ORDER SIGNED

Now on this 29th day of December, 1947, Frank Pellegrini, Assistant United States Attorney, appearing for the Government, these causes come on before the Court for hearing on Motion of United States for Leave to Intervene. The matter is called and granted without argument. Mr. Pellegrini states that this is agreeable to opposing counsel. Upon presentation by Robert W. Graham, an Order re interrogatories is signed in cause No. 1186 as well as above cases.

Journal No. 37, Page 873. [18]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.
2. That the Portal-to-Portal Act of 1947, ap-

proved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question.

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent [19] with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,
Attorney General.

By /s/ HERBERT A. BERGSON,
Acting Assistant Attorney
General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant United States
Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of Justice.

Copy Received 12-11-47.

ZABEL, POTH & PAUL,
By LM.

Copy received 12/11/47.

/s/ NORMAN R. McMICKEN,
Atty. for Defendant.

[Endorsed]: Lodged Dec. 11, 1947. Filed Dec.
29, 1947. [20]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1186

H. A. LASSITER and W. R. MORRISON,
Plaintiffs,
vs.

GUY F. ATKINSON COMPANY, a Corporation,
Defendant.

No. 1293

VERNON O. TYLER,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a
Corporation, and MORRISON-KNUDSEN
CO., a Corporation,

Defendants.

No. 1408

WILLIAM LESLIE KOHL,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a
Corporation, and MORRISON-KNUDSEN
CO., a Corporation,

Defendants.

No. 1420

ARTHUR J. SESSIN,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a
Corporation, and MORRISON-KNUDSEN
Co., a Corporation,

Defendants.

No. 1456

RAYMOND N. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION CO., a Corporation,
Defendant.

No. 1628

OWEN J. McNALLY,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a
Corporation, and MORRISON-KNUDSEN
CO.,

Defendants.

STIPULATION AND PRE-TRIAL ORDER
RE PORTAL ACT HEARING

I.

It Is Hereby Stipulated by and between the parties hereto through their attorneys of record:

(1) That the above-named causes may be consolidated for purposes of hearing only those matters relating to the Portal-to-Portal Act of 1947 and in particular those matters relating to the defenses asserted by the defendants under Sections 9 and 11 of said Act, said hearing to be herein referred to as the Portal Act hearing.

(2) Defendants contend that the acts or omis-

sions complained of in these actions and each of them were in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals or interpretations of an agency of the United States or administrative practices or enforcement policies of an agency of the United States with respect to the class of employers to which defendants belonged and plaintiffs deny the same.

(3) Defendants contend that the acts or omissions alleged as giving rise to these actions and each of them were in good faith and that the defendant had reasonable grounds for believing that the acts or omissions were not a violation of the Fair Labor Standards Act of 1938, and plaintiffs deny same.

(4) Plaintiffs contend that the Portal-to-Portal Act of 1947 is unconstitutional, and in particular such sections or portions thereof which may be deemed applicable to these causes or any of them, and defendants deny the same.

(5) In part II are listed certain exhibits which may be offered in the Portal Act Hearing for these causes by the respective parties together with the stipulations pertaining to said exhibits. With reference to said exhibits and with reference to all evidence and testimony to be introduced by any party at said Portal Act Hearing it is Stipulated as follows:

- (a) All evidence, documentary or oral, relating to any one of the defendants shall be

deemed to relate to all of the defendants and all documents or communications sent to or received by one defendant shall be deemed to have been sent to, received by or come to the attention and within the knowledge of all other defendants. All information, knowledge, beliefs and actions of any of the defendants shall also be deemed to be the information, knowledge, beliefs and actions of all other defendants.

- (b) The objections of any plaintiff as to the admissibility of any exhibit, as hereinafter reserved, or to any testimony shall be deemed the objection of all plaintiffs and the objection of any defendant as to the admissibility of any exhibit or testimony shall be deemed the objection of all other defendants.
- (c) All objections to the admissibility of any exhibit listed in part II hereof save and except the objections to relevancy and materiality hereinafter noted are expressly waived by all parties, the identification and authenticity of all exhibits being admitted by all parties and it being expressly agreed that photostatic or other copies of all documents may be offered in lieu of the originals of such documents.
- (d) In the event any appeal should be taken by any party to any of these causes it is Stipulated and Agreed that the original exhibits designated as a part of the record

on appeal shall, subject to the approval of the court, be transmitted to the Circuit Court of Appeals and not printed in the record.

(6) It Is Stipulated that all exhibits may be offered by all parties at the outset of the Portal Act Hearing subject to such reservations and objections as to relevancy and materiality as may hereinafter be noted. It is further Agreed that the offering of oral testimony may proceed and that the Court shall reserve ruling upon the admissibility of such exhibits to which objections are made. It is understood that any testimony relating to exhibits concerning which reservation of ruling is made shall be received subject to such ruling as may be made by the Court relative to these exhibits. It is Understood and Agreed that all counsel shall hold themselves in readiness upon call of the Court following the offering of oral testimony to be of such assistance as they may by way of oral argument or otherwise as an aid to the Court in determining such reservations of ruling as may be made.

Dated this 5th day of December, 1947.

BOGLE, BOGLE & GATES,
ROBERT W. GRAHAM,
Attorneys for Defendant Guy F. Atkinson Co. in
Cause No. 1186.

ALLEN, HILEN, FROUDE &
DeGARMO,
GERALD de GARMO,
Attorneys for Defendants S. Birch & Sons Con-
struction Co., a Corporation, and Morrison-
Knudsen Co., a Corporation, Cause Nos. 1293,
1408, 1420, 1628.

MAURICE R. McMICKEN,
Attorney for Defendant West Construction Co., a
Corporation, Cause No. 1456.

ZABEL, POTH & PAUL,
FREDERICK PAUL,
Attorney for Plaintiffs in Cause Nos. 1186, 1456,
1628.

WETTRICK, FLOOD &
O'BRIEN,
GEORGE J. TOULOUSE, JR.,
Attorneys for Plaintiffs in
Cause No. 1293.

McMICKEN, RUPP &
SCHWEPPE,
MARY ELLEN KRUG,
Attorneys for Plaintiffs in
Cause Nos. 1408, 1420. [24]

ORDER

It is hereby Ordered that the terms and conditions embodied in the foregoing stipulation of counsel are hereby approved and the same shall be and hereby are, established to be the terms and conditions of the Portal Act Hearing on the above causes as defined in the foregoing stipulation.

Done in Open Court this 8th day of December, 1947.

JOHN C. BOWEN,
District Judge.

Presented by:

ROBERT W. GRAHAM,
Of Bogle, Bogle & Gates.

[Endorsed]: Filed Dec. 8, 1947. [25]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Case No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY,

Defendant.

Before: The Honorable John C. Bowen,
District Judge.

Seattle, Washington, January 16, 1948
10:00 o'Clock A.M.

COURT'S DECISION

The Court: As to Mr. Irby the Court is not convinced by the proof that he was acting in a capacity otherwise than as one exercising discretion and judgment as far as his work was concerned. That conclusion is supported by the witness McLeod that Mr. Irby's action as to what should be done about an employee's problems in his employment, whether he should be retained, fired, promoted, demoted or sent to some other area or recommended for such, rested upon Mr. Irby's final decision. That does not show him acting other than as a principal, vice-principal, or business manager in his department. An ordinary employee does not exercise such authority as that.

The Court finds, concludes and decides that as to Mr. Irby he was acting not in the capacity of an employee covered by the provisions of the Act but on the side of the principal who was the employer. He was acting in a managerial and administrative capacity from day to day and from time to time, employing his own discretion and judgment as to how his duty would be performed and as to the result of the performance by him of his duty.

As to each and all of the other plaintiffs and assignors to plaintiff, the Court is just as clearly convinced by the proof that they exercised no real discretion in their work but were following and applying a pattern in their work which was laid down for them and determined by others superior in authority in the company's organization.

There is no question but what the services of each one of the others concerned commerce and was a part of the commerce in which the defendant company unquestionably was engaged.

I do not think anything would be gained by discussing the details of their services as performed by [27] each of them because the evidence is clear that the nature of their services was of the character just stated by the Court and that the work and service of each one of the other persons involved here were covered by the provisions of the Act and they are, subject to later determination as to the defendant's good faith, entitled to the overtime stated in these exhibits less deductions on account of the work done in Canada and on account of the work done by one of them at a time before the period within which claims of this kind may be asserted.

Is there anything not covered by the announced decision? The other question, the defense of the defendants' of good faith, will be considered in connection with the same issue in other cases. Is there anything else?

Mr. Paul: No. I think that is all.

The Court: It is ordered that the settling and entering of findings of fact, conclusions of law and judgment in this case shall await the determination of the whole case and any other undecided issues. The case as to the issue of good faith will be heard at the times and in the manner arranged for similar hearings in the other cases. Is that agreeable?

Mr. Paul: Yes, your Honor.

Concluded. [28]

No. 1420

ARTHUR J. SESSING,

Plaintiff,

vs.

S. BIRCH & SONS and

MORRISON-KNUDSEN CO.,

Defendants.

No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION CO.,

Defendant.

No. 1628

OWEN J. McNALLY,

Plaintiff,

vs.

S. BIRCH & SONS and

MORRISON-KNUDSEN CO.,

Defendants.

Before: The Honorable John C. Bowen,

District Judge

Seattle, Washington, February 16, 1948

3:30 o'clock P.M.

COURT'S DECISION

The Court: I wish to announce the Court's decision in these Fair Labor Standards Act cases which are pending in this Court and which have been tried. I wish the decision to be regarded as made in each and all of them unless, subsequent to the Court's announcement of decision, some other or different order is entered. I am referring to causes numbered 1186, 1293, 1408, 1420, 1456, and 1628.

Upon the question of whether or not in these cases the so-called Portal to Portal Act of 1947 is constitutional (defenses in the pending cases having pursuant to that Act been set up), I have no hesitancy in coming to the conclusion that it is constitutional. One reason which I wish to state why I think so is that the Act does not purport to take away or to deprive the plaintiffs of the right which they had under the law as it existed before that Portal to Portal Act was enacted by Congress.

The Portal to Portal Act merely declares that certain acts which occurred during the accrual of plaintiffs' right, if pleaded and proved to have been done in good faith reliance upon a ruling of a government agency, might be a defense which the defendant could set up against plaintiff employees' claims. In my opinion, former court decisions in other situations upholding the right of [31] legislatures to modify or create statutes of limitations in bar of existing claims are authority for upholding the power of Congress in the Portal to Portal

Act to say whether or not certain good faith acts of the defendants done during the time plaintiffs' causes of action were arising might operate as a defense in the hands of the defendant employers. There are other reasons in my opinion why the Act is constitutional but I will not stop to discuss them now.

I pass now to the question of whether or not the defendants have sustained the burden of establishing their affirmative defense of good faith asserted by them in accordance with the provisions of the Portal to Portal Act, that is, whether or not the acts and things done by them which are now complained of by the plaintiffs were done by the defendants in good faith reliance upon the construction put upon the contracts by a governmental agency or agencies. In that connection it may be observed that the contracts concerned the waging of war against the nation's enemies. The war times and the war policy of the nation as declared by acts of congress, and as declared more powerfully by the common consent of the rank and file of American citizens, called upon every citizen whether acting in a civilian or military capacity to do everything humanly possible to advance the cause of this nation in its war activity. And to [32] that end every person among us and every company or business operated by or for such a person was called upon to exert every possible effort to advance the cause of this nation at war.

These defendants, in line with that duty, consented to act under these contracts in a definite plan to advance that war effort. In doing so, they

agreed to be bound by a contract which the government's military powers exacted or prescribed. That contract in terms stipulated the method for determining or dealing with questions pertaining to the employer-employee relations and particularly in respect to overtime service of employees; and the contract stated that those matters should be referred to the War Department agency named in the contract. Both parties agreed that that was the proper way of dealing with those subjects. How then can it be questioned that the employer-contractor representing in a very real sense the duty of the citizen or his business organization should abide by the interpretations of the specific government agency designated in the contract as the agency of the War Department to make such interpretations? How can it be said that the contracting employers of these plaintiffs in doing so failed to exercise good faith in those subjects by not taking on the extra duty of looking elsewhere for interpretations not called for in the contract when such [33] other procedure might have violated the terms and provisions of the contract itself?

The Court finds, under the evidence in this case, that reasonable prudence and good faith did not call upon these employers of the plaintiffs in these actions to disregard the contract with the War Department and determine for themselves whether or not the Fair Labor Standards Act and the authorities of the government administering that Act had any jurisdiction over such matters as employer-employee relations and overtime pay of employees.

The evidence overwhelmingly convinces the Court that in respect to all these cases the employers in good faith and with the utmost caution lived up to the contracts they had with the War Department to build these military installations in Alaska and to do all the work and perform all of the services reasonably required to that end, and that in doing so the end result of their activities was more a military effort than a commercial effort, although in the course of performance of the contracts by the employers, they did carry on some commerce. Further, in the opinion of the Court, the contracting employers of plaintiffs amply demonstrated on every hand their purpose and determination to, and they did, exercise good faith in dealing with any and all questions as to employer-employee relations and in respect to overtime of employees, all in [34] accordance with the rulings of the agency of the government as provided in the contracts themselves.

For these, among other reasons, the Court finds, concludes and decides that the plaintiffs take nothing by their actions in each and all of these several actions pending in this Court.

* * * * *

The Court: Plaintiff McNally was engaged in commerce, but as to the Portal to Portal Act good faith affirmative defense, the Court makes the same decision in this case as that announced in the others, namely, that the defendants have alleged and proved by a preponderance of the evidence and by the overwhelming evidence that all matters and things respecting overtime done by the defendant employer

of plaintiff in this action were done in good faith reliance upon the rulings and interpretations made by an agency of the government as provided in the contract. Therefore, plaintiff McNally is not entitled to recover.

(Concluded.)

[Endorsed]: Filed March 2, 1948. [35]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY,
a corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action having come on regularly for trial in the above entitled court, sitting without a jury, plaintiff being represented by Frederick Paul, of Zabel, Poth & Paul, his attorneys, the defendant being represented by Maurice R. McMicken, its attorney, and the court having heard

the testimony of the witnesses, considered the evidence and being fully advised in the premises and having rendered its oral decision herein, the court does hereby make the following

FINDINGS OF FACT

I.

That this action was commenced and prosecuted by plaintiff on his own behalf, and as assignee of Richard T. Irby, Stuart H. Johnston and Francis M. Watson, pursuant to written assignments duly and regularly executed by said named assignors prior to the commencement of this action, under and by virtue of the Fair Labor Standards Act of 1938, as amended.

II.

That defendant is a Massachusetts corporation qualified to do business in the State of Washington.

III.

That during the years 1944 and 1945, defendant under certain Cost-Plus-a-Fixed-Fee contracts entered into with the United [36] States of America, acting by and through the Corps of Engineers of the United States War Department, was performing certain military construction work at Adak and at Shemya in the Aleutian Islands within the Territory of Alaska, and for the purpose of carrying out said contracts defendant was required to and did maintain a Seattle Office in which plaintiff and plaintiff's assignors were employed by defendant, as hereinafter set forth, and from which office de-

fendant purchased nearly \$5,000,000 of materials and supplies throughout the United States for transportation to Alaska in interstate commerce for use on such contract jobsites, hired men throughout the United States in large numbers who were transported from their homes to the Alaska jobsites, and upon completion of their employment were transported from the jobsites in Alaska to their homes in the United States, and whose payroll records were maintained in the defendant's Seattle Office.

IV.

That plaintiff and plaintiff's assignors were engaged in assisting in the performance of defendant's contracts with the United States of America, and in the movement of materials and supplies in interstate commerce and the transportation and housing of personnel moving in interstate commerce, as follows:

(a) Plaintiff, Raymond M. Naylor, who was possessed of special training and experience in the handling of traffic and transportation, was employed by defendant from April 4, 1944, to August 12, 1945, inclusive, as Assistant Personnel Manager, at a base weekly salary of \$63.63 for 40 hours of work for the period from April 4, 1944, to April 29, 1945, at Seattle, Washington, and from May 2 to July 26, 1945, inclusive, and from July 31 to August 9, 1945, inclusive, he was located at Prince Rupert, British Columbia, Canada, at a base salary varying from \$63.63 to \$73.17 per 40 hour week; that during the employment period at Seattle from April 4, 1944, to April 29, 1945, inclusive, plaintiff, Raymond M.

Naylor, [37] worked in the Transportation Division of the Personnel Department of defendant, and assisted in the transportation of workmen employed by defendant from their homes throughout the United States to Seattle and thence to the jobsites in Alaska, and from such jobsites at the completion of their contracts to Seattle and thence to their homes, and of the housing of all personnel at Seattle while awaiting transportation to the jobsites or to their homes, and in the course of such work he was assisted in the work by four employees; he made arrangements for rail transportation to and from Seattle, having authority to purchase railroad tickets on credit in defendant's name, and in arranging for the housing of men in Seattle while awaiting transportation to the jobsites or to their homes he had authority to place men in various hotels in Seattle on credit in the defendant's name; he met trains, ships and planes arriving and departing with jobsite employees, supervised their loading and unloading, and met hospital planes arriving with medical evacuees from the jobsites and arranged further medical facilities for them, in all of which work the said Raymond M. Naylor acted under the general supervision of defendant's Personnel Manager but was not required to and did not exercise discretion and independent judgment. That during the period from April 4, 1944, to April 29, 1945, inclusive, the said Raymond M. Naylor worked a total of 705½ hours in excess of 40 hours per week for which he was paid only straight time at the straight time rate of \$1.5909 per hour.

(b) Plaintiff's assignor, Richard T. Irby, who was possessed of special training in the handling of employee problems, was employed by defendant from February 17, 1944, to April 30, 1945, inclusive, as Employee Relations Advisor at a base weekly salary of \$68.18 for 40 hours of work from February 17, 1944, to December 3, 1944, inclusive, and at a base weekly salary of \$70.00 for 40 hours of work from December 4, 1944, to April 30, 1945, inclusive; [38] and during such period of employment he was in direct charge of the Employee Relations Department which was a liaison office between employee and department head and between employee and the Contracting Officer; all requests for increases of salary for employees were subject to his approval or disapproval and transfers of employees from one department to another had to have his sanction; termination of employees could not be effective without his written approval and work referrals had to be okched by him; he conducted orientation interviews with employees to provide information on working conditions, leave regulations, transportation, housing, etc., his duties being confined to Seattle Office employees of defendant; in all of which work the said Richard T. Irby acted in an administrative capacity under only the general direction of A. McLeod, defendant's Business Manager, and was required to and did exercise discretion and independent judgment. That during the period from February 17, 1944, to December 3, 1944, inclusive, the said Richard T. Irby worked a total

of 191 hours in excess of 40 hours per week for which he was only paid straight time at the straight time rate of \$1.7054 per hour and during the period from December 4, 1944, to April 30, 1945, inclusive, he worked a total of 80 hours in excess of 40 hours per week for which he was only paid straight time at the straight time rate of \$1.75 per hour.

(c) Plaintiff's assignor, Stuart H. Johnston, who was possessed of special training and experience in the expediting of materials and supplies, was employed by defendant from January 9, 1944, to August 27, 1944, inclusive, as an Expediter at a weekly base salary of \$68.18 for 40 hours of work, and from August 28, 1944, to April 30, 1945, inclusive, as Chief Expediter at a weekly base salary of \$70.00 for 40 hours of work; that as Expediter he worked in the Expediting Section of defendant's Purchasing Department and kept records of vendors' shipments to Government receiving warehouses, arranging for Government inspection of materials received, [39] spent considerable time in tracing lost or strayed shipments from vendors and phoned vendors to keep shipments rolling to arrive on delivery date promised, all under the direction of the Chief Expediter, all of which duties were largely clerical in nature and did not require the use of discretion or independent judgment; that after August 28, 1944, as Chief Expediter, Stuart H. Johnston worked in the Expediting Section of the defendant's Purchasing Department, assisted by six employees of said Section, instructed employees in

the proper handling of Purchase Orders on the defendant's war contracts, determined the method of expediting the movement of materials and supplies from vendors throughout the United States to Seattle and Alaska, prepared weekly shipping status reports for the jobsite offices and weight displacement reports for the United States Engineers, in all of which work he was not required to and did not exercise discretion and independent judgment. That during the period January 31, 1944, to August 27, 1944, inclusive, the said Stuart H. Johnston worked a total of 116 hours in excess of 40 hours per week for which he was paid only straight time at the straight time rate of \$1.7054 per hour, and during the period August 28, 1944, to April 30, 1945, inclusive, he worked a total of 135½ hours in excess of 40 hours per week for which he was paid only straight time at the straight time rate of \$1.75 per hour.

(d) Plaintiff's assignor, Francis M. Watson, who was possessed of special training and experience in the hiring of personnel, was employed by defendant from March 10, 1944, to December 31, 1944, inclusive, as a Recruiter, at a weekly base salary of \$59.09 for 40 hours of work, and during such period of employment he interviewed at defendant's Seattle Office applicants for work as manual employees at the jobsites in Alaska, such men being either Seattle residents or men not local residents but not brought to Seattle by defendant and using Seattle as their place of hire, and he selected [40] or

rejected applicants on the basis of their written application, oral statements, appearances and references, and as such Recruiter, Francis M. Watson was under the general supervision of defendant's Personnel Manager, and in all of such work he was not required to and did not exercise discretion and independent judgment. That during said period from March 10, 1944, to December 31, 1944, inclusive, he worked a total of 410 hours in excess of 40 hours per week for which he was paid only straight time rate of \$1.4772 per hour.

V.

That all practices of the defendant with respect to the payment of overtime compensation for all hours worked by plaintiff and plaintiff's assignors in excess of forty (40) hours in any one week were in good faith in conformity with and in reliance on administrative regulations, rulings, approvals and interpretations of the following agencies of the United States, to wit, the United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administration Agency.

VI.

That all practices of the defendant with respect to the payment of overtime compensation for all hours worked by plaintiff and plaintiff's assignors in excess of forty (40) hours in any one week were in good faith and that the defendant had reasonable grounds for believing that such practices were not

a violation of the Fair Labor Standards Act of 1938, as amended.

Done in Open Court this 3rd day of March, 1948.

/s/ JOHN C. BOWEN,

District Judge. [41]

From the foregoing Findings of Fact, the Court does hereby make the following

CONCLUSIONS OF LAW

I.

That the plaintiff, Raymond M. Naylor, and plaintiff's assignors, Richard T. Irby, Stuart H. Johnston and Francis M. Watson, were engaged in interstate commerce during their respective periods of employment by the defendant.

II.

That plaintiff's assignor, Richard T. Irby, was a bona fide administrative employee of defendant under and within the terms and provisions of the Regulations of the Administrator of the Wage & Hour Division of the United States Department of Labor during his entire time of employment by defendant and hence is not subject to and is within the exemptions of the Fair Labor Standards Act of 1938, as amended.

III.

That the two-year Statute of Limitations of the State of Washington is applicable to the causes of action asserted by the complaint herein, and any

recovery for overtime prior to January 29, 1944, is barred by such statute.

IV.

That the Fair Labor Standards Act of 1938, as amended, has no application to work performed by plaintiff Raymond M. Naylor while he was at Prince Rupert, British Columbia, Canada.

V.

That if it were not for the provisions of the Portal-to-Portal Act of 1947, plaintiff Raymond M. Naylor and his assignors Stuart H. Johnston and Francis M. Watson would have been entitled to judgments against defendant under the Fair Labor Standards Act of 1938, as amended, for the following amounts for unpaid overtime compensation: Raymond M. Naylor \$561.19, Stuart H. Johnston \$217.47 and [42] Francis M. Watson \$302.84, plus similar amounts as liquidated damages, plus costs and a reasonable attorney's fee.

VI.

That the Portal-to-Portal Act of 1947 is, and sections 9 and 11 thereof are, constitutional.

VII.

That the defendant is subject to no liability to the plaintiff or to any of the plaintiff's assignors, for or on account of defendant's failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

VIII.

That the action of the plaintiff herein should be dismissed with prejudice and with costs in favor of the defendant, to be taxed in accordance with law and the rules of this Court.

Done in Open Court this 3rd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ MAURICE R. McMICKEN.

Copy received March 3, 1948.

/s/ FREDERICK PAUL,
Attorney for Plaintiffs.

[Endorsed]: Filed March 3, 1948. [43]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY, a
Corporation,

Defendant.

JUDGMENT

The above-entitled action having come on regularly for trial in the above-entitled court, sitting without a jury, plaintiff being represented by Frederick Paul, of Zabel, Poth & Paul, his attorneys, the defendant being represented by Maurice R. McMicken, its attorney, and the court having heard the testimony of the witnesses, considered the evidence and being fully advised in the premises, having rendered its oral decision herein and having made and entered its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the action of the plaintiff herein be and the same is hereby dismissed, with prejudice and with costs in favor of the defendant and against the plaintiff, to be taxed in the manner provided by law and by the rules of this Court.

Done in Open Court this 3rd day of March, 1948.

/s/ JOHN C. BOWEN.

District Judge.

Presented by:

/s/ MAURICE R. McMICKEN.

Approved as to form:

/s/ FREDERICK PAUL.

[Endorsed]: Filed Mar. 3, 1948. [44]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: West Construction Company, a Massachusetts Corporation, Defendant, and to Maurice McMicken, Attorney for Said Defendant, and to United States of America and J. Charles Dennis, Its Attorney:

Notice is hereby given that the above-named plaintiff appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, involved in all causes of action entered in the above-named action on the 2nd day of March, 1948, and which is now final.

Dated at Seattle, Washington, this 22nd day of March, 1948.

ZABEL, POTH & PAUL and
FREDERICK PAUL,
FREDERICK PAUL,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 25, 1948. [45]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action No. 1456

RAYMOND M. NAYLOR,

Plaintiff,

vs.

WEST CONSTRUCTION COMPANY, a
Corporation,

Defendant.

UNITED STATES OF AMERICA,

Intervenor.

AMENDED STATEMENT OF POINT ON AP-
PEAL OF APPELLANT, RAYMOND M.
NAYLOR

The point on the appeal of the appellant, Raymond M. Naylor, is that the Portal-to-Portal Act of 1947, Sections 9 and 11 thereof, are unconstitutional as the deprivation of property without due process of law and the usurpation of the Judicial power by the Congress of the United States, except cause of action No. 2, Richard T. Irby.

ZABEL, POTH & PAUL and
FREDERICK PAUL,
FREDERICK PAUL,
Attorneys for Plaintiff.

Endorsed: Copy Received March 25, 1948.

MAURICE R. McMICKEN,
By Atty. for Defendant.

Endorsed: Received a copy of the within Amended Statement of Points this 25th day of March, 1948.

J. CHARLES DENNIS,
Attorney for Intervenor.

[Endorsed]: Filed Mar. 15, 1948. [46]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men By These Presents:

That I, Raymond M. Naylor, the plaintiff above named, as principal and the National Surety Corporation, a corporation, organized under the laws of the State of New York, and authorized to transact business of surety in the State of Washington, as surety are held and firmly bound unto West Construction Company, a Massachusetts corporation, the defendant named in the above-entitled action, and United States of America, intervenor, in the just and full sum of \$250.00, for which sum well and true to be paid, we bind ourselves, our and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of April, 1948.

The condition of this obligation is such, that whereas, the above-named defendant on the 2nd day of March, 1948, in the above-entitled action and

court, recovered judgment against the plaintiff above named; and whereas, the above-named principal has heretofore given due and proper notice that his appeals from said judgment of the above-entitled court to the Circuit Court of Appeals [47] for the Ninth Circuit,

Now, Therefore, if the said principal, Raymond M. Naylor, shall pay to West Construction Company, a Massachusetts corporation, and to United States of America, all costs and damages that may be awarded against said defendant and intervenor on the appeal, or on the dismissal thereof, not to exceed the sum of \$250.00 and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the United States Circuit Court of Appeals for the Ninth Circuit may render, or make, or order to be rendered, or made by the above-entitled court, then this obligation to be void; otherwise to remain in full force and effect.

RAYMOND M. NAYLOR,
By ZABEL, POTH &
FREDERICK PAUL,
His Attorneys.

NATIONAL SURETY
CORPORATION,
[Seal] By MILDRED PALITZKE,
Attorney-in-Fact.

[Endorsed]: Filed April 12, 1948. [48]

[Title of District Court and Cause.]

AMENDED PLAINTIFF'S DESIGNATION
OF PORTIONS OF RECORD ON AP-
PEAL

The above-named plaintiff, appellant herein, hereby supplements its designation of the following portions of the record in the above-entitled action for transmittal by the Clerk of the above-entitled Court to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Complaint.
2. Answer and Affirmative Defense.
3. Amendment to Answer of Defendant.
4. Pleading of the United States in Intervention.
5. Stipulation of Pre-Trial Order re Portal Act hearing, pgs. 1, 2, 3 and up to line 10 of p. 4, and pgs. 43 and 44.
6. The Court's Oral Decision of January 16, 1948.
7. The Court's Oral Decision of February 16, 1948, pgs. 1, 2, 3, 4, 5 and 6, up to and including line 7 of p. 7, and lines 2 to 12, inclusive, of p. 10.
- 7a. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Notice of Appeal.
10. Amended Statement of Point on Appeal.
11. Stipulation for Costs.

12. This Amended Designation of Portions of the Record.

ZABEL, POTH & PAUL and
FREDERICK PAUL,
FREDERICK PAUL,
Attorneys for Plaintiff.

Endorsed: Received a copy of the within Amended Designation, etc., this 25th day of March, 1948.

J. CHARLES DENNIS,
Attorney for Intervenor.

Endorsed: Copy Received March 25, 1948.

MAURICE R. McMICKEN,
Atty. for Deft.

[Endorsed]: Filed Mar. 25, 1948. [49]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF ADDI-
TIONAL PORTION OF RECORD ON AP-
PEAL

The above-named defendant hereby designates the following additional portion of the record in the above-entitled action for transmittal by the Clerk of the above-entitled Court to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Minute entry of December 29, 1947, allow-

ing Intervention of United States of
America.

2. This Designation.

MAURICE R. McMICKEN,
Attorney for Defendant.

Copy received 4-1-48.

ZABEL, POTH & PAUL,
By L. M.

Received a copy of the within Defs. Designation
of Add. Points, etc., this 1st day of April, 1948.

J. CHARLES DENNIS,
Attorney for Intervenor.

[Endorsed]: Filed Apr. 1, 1948. [50]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States
District Court for the Western District of Wash-
ington, do hereby certify that the foregoing type-
written transcript of record, consisting of pages
numbered 1 to 50, inclusive, is a full, true and
complete copy of so much of the record, papers and
other proceedings in the above and foregoing enti-
tled cause as is required by Plaintiff's Amended

Designations of Record filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same constitute the record on appeal from the Judgment of said United States District Court for the Western District of Washington to the United States Circuit of Appeals for the Ninth Circuit, filed March 3, 1948.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparing record on appeal herein, to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's Fees for making record, certificate or return.

11 pages at 40c.....	\$ 4.40
38 pages at 10c.....	3.80
Notice of Appeal.....	5.00

Total\$13.20

I further certify that the costs of this record have been paid by the attorneys for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 12th day of April, 1948.

[Seal]

MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,

Chief Deputy Clerk. [52]

[Endorsed]: No. 11896. United States Circuit Court of Appeals for the Ninth Circuit. Raymond M. Naylor, Appellant, vs. West Construction Company, a Corporation, and United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed April 14, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11896

RAYMOND M. NAYLOR,

Appellant,

vs.

WEST CONSTRUCTION COMPANY, a
Corporation,

Appellee.

ADOPTION OF STATEMENT OF POINTS ON
APPEAL FILED IN U. S. DISTRICT
COURT

Comes now the above-named appellant and hereby adopts the statement of points on appeal heretofore

filed in the United States District Court for the Western District of Washington.

ZABEL, POTH & PAUL, and
FREDERICK PAUL,
By /s/ FREDERICK PAUL,
Attorneys for Appellant.

[Endorsed]: Filed June 11, 1948.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS ON RECORD

Comes now the above-named appellant and hereby designates for printing the entire certified transcript.

ZABEL, POTH & PAUL, and
FREDERICK PAUL,
By /s/ FREDERICK PAUL,
Attorneys for Appellant.

[Endorsed]: Filed June 11, 1948.

United States
Circuit Court of Appeals
For the Ninth Circuit

LILLIE T. HOGUE and ELIAS HOGUE,
Appellants,
vs.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

JUN 24 1946

PAUL P. O'BRIEN,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit

LILLIE T. HOGUE and ELIAS HOGUE,
Appellants,

vs.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

MARSHALL DENTON, JR.,
3519 S. Central Ave.,
Los Angeles 11, Calif.

For Appellee:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
SHERMAN GRANCELL,
1206 Santee St.,
Los Angeles 15, Calif. [1*]

In the District Court of the United States, Southern
District of California, Central Division

No. 7094-B

FRANK R. CREEDON, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

LILLIE T. HOGUE, ELIAS HOGUE, DOE I,
DOE II,

Defendants.

COMPLAINT FOR TREBLE DAMAGES
AND INJUNCTION

For a First Cause of Action

I.

Plaintiff, as Housing Expediter, Office of the Housing Expediter, brings this action for injunction pursuant to Section 205(a) to enforce compliance with Section 4 and for treble damages on behalf of the United States of America pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., hereinafter referred to as "The Act," and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator pursuant to Section 2 of the Act.

II.

Jurisdiction of this action is conferred upon this Court by Sections 205(c) and 205(e) of the Act. [2]

III.

At all times mentioned herein, there has been and now is in effect a Rent Regulation for Housing issued pursuant to Section 2(b) of the Act for the Los Angeles Defense Rental Area.

IV.

That the defendants, Doe I and Doe II, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

V.

That the defendant is a resident of the City of Los Angeles, County of Los Angeles, State of California, in the Southern District of California in the Central Division thereof, and within the jurisdiction of this Court.

VI.

During all times herein mentioned defendant has received rent for the use and occupancy of those certain housing accommodations, subject to said Housing Regulations within said Defense Rental Area, known and described as 337 East 42nd Street, Los Angeles, California.

VII.

That on and since April 1, 1946, exclusive of the period July 1 to July 25, 1946, inclusive, the defendant has received for the use and occupancy of the housing accommodations hereinbefore described, rents in excess of the maximum rents permitted under the said Rent Regulations and Orders of the Rent Director; that the number and names of tenants and the amount of overcharges are facts peculiarly within the knowledge of said defendant; that plaintiff is unable at this time, to allege with certainty the [3] amount of rents charged in excess of said maximum rent but that plaintiff upon ascertaining the amount or amounts thereof, and the names of said tenants, will ask leave to amend this complaint and set forth the amount or amounts of said overcharges and the tenants from whom said overcharges were received.

VIII.

That every tenant overcharged as above alleged has failed to institute an action pursuant to Section 205(e) of said Act, and more than thirty days have elapsed since the occurrence of the violations.

For a Second Cause of Action

I.

Plaintiff re-alleges and incorporates herein Paragraphs III, IV, V, VI and VII of his first cause of action, as though set out in full herein.

II.

In the judgment of the Housing Expediter, Office

of the Housing Expediter, said defendants have engaged in actions and practices in violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., hereinafter called "The Act," which actions and practices consist of violations of Rent Regulations for Housing (10 Fed. Reg. 13528), issued in accordance with Section 2(b) of "The Act," and therefore, the Housing Expediter brings this action pursuant to the provisions of Section 4(a). Jurisdiction of this action is conferred by Section 205(c) of said Act.

Wherefore, the plaintiff demands:

A. Judgment for the plaintiff to recover of the defendant treble the total amounts received by the defendant from persons as rent for the use and occupancy of the housing accommodations described in the complaint, which were in excess of the maximum rents established by the Act and regulations issued thereunder, and further that;

B. The defendant be ordered and directed to tender to all available tenants as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Act and regulations issued thereunder [4] which were received by the defendant, his agents, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by said regulations, provided that refunds made by the defendant to such persons, in com-

pliance with the directions of the Court for rents received within one year prior to the bringing of this action, shall be deducted from the amount of the judgment prayed for in the preceding Paragraph "A."

C. A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation with them from directly or indirectly demanding or receiving, for accommodations subject to said Rent Regulations for Housing, rents in excess of the maximum rent permitted under said Regulations, as heretofore or hereafter amended or extended, or in excess of the maximum rent permitted by any other Regulation for Housing issued pursuant to the Emergency Price Control Act of 1942, as heretofore or hereafter amended or extended.

AUSTIN CLAPP,

ABE I. LEVY,

STEPHEN D. MONAHAN,

By /s/ STEPHEN D. MONAHAN,

Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1947. [5]

[Title of District Court and Cause.]

BILL OF PARTICULARS

In response to defendants' motion for a Bill of Particulars, plaintiff files the following schedule:

Location of property: 337 East 42nd Street, Los Angeles, California.

Unit No.	Tenant	Period of Occupancy Commencing	Maximum Legal Rent Per Week	Rent Received Per Week	Total Over-Charges
Rm. #2	Willie B. James.....	5/22/45 - 4/ 1/46=45 wks.	\$5.00	\$10.00	\$ 225.00
Rm. #2	Willie B. James.....	4/ 1/46 - 4/ 7/47=41 wks.	5.00	8.50	143.50
Rm. #1					
Front Rm.	Artie Mae Moore.....	11/ 1/44 - 4/ 1/46=73 wks.	5.00	10.00	365.00
Rm. #1					
Front Rm.	Artie Mae Moore.....	4/ 1/46 - 3/ 8/47=37 wks.	5.00	8.50	129.50
Rm. #5					
Rear	Mrs. Eloise Sadler.....	1/ 1/46 - 4/ 1/46=13 wks.	5.00	10.00	65.00
Rm. #5					
Rear	Mrs. Eloise Sadler.....	4/ 1/46 - 3/ 7/47=37 wks.	5.00	8.50	129.50
Back Room	Mrs. Tela Grant.....	12 2/45 - 4/ 1/46=21 wks.	5.00	10.00	105.00
Back Room	Mrs. Tela Grant.....	4/ 1/46 - 3/13/47=37 wks.	5.00	8.50	129.50
Rm. #3					
Rear	Miss Louise.....	12/28/45 - 4/ 1/46=13 wks.	5.00	10.00	65.00
Rm. #3					
Rear	Miss Louise.....	4/ 1/46 - 3/13/47=37 wks.	5.00	8.50	129.50
			Total Overcharges		<u>\$1486.50</u>

The maximum rents were not the subject of an Order of the Rent Director.

Respectfully submitted this July 23, 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
By /s/ CASSEL JACOBS.

[Affidavit of service by mail attached.]

[Endorsed]: Filed July 23, 1947. [7]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR TREBLE
DAMAGES AND INJUNCTION

Come now Lillie T. Hogue and Elias Hogue, hereinabove named as defendants, and in answer to plaintiff's complaint filed herein, Admit, Deny and Allege:

I.

In answer to Paragraph VII of the alleged first cause of action of said complaint, these defendants deny, generally and specifically, each, all and every allegation, matter, fact and thing therein alleged and the whole thereof.

Answering the Alleged Second Cause of Action of the Said Complaint, Said Defendants Admit, Deny and Allege:

I.

Deny, generally and specifically, the allegations of said Paragraph VII of Paragraph I of the said alleged second cause of [9] action, and the whole thereof.

For a Further, Separate and Distinct Affirmative Defense, Said Defendants Allege:

I.

That under the applicable provisions of the Rent Regulations for Housing, excess rents, collected one year prior to the commencement of the action to recover such alleged overcharge, are not recoverable.

Wherefore, said defendants pray that plaintiff take nothing by reason of his complaint on file herein, and for such other and further relief as may appear just and equitable herein.

/s/ MARSHALL DENTON, JR.,

Attorney for Defendants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 6, 1947. [10]

NOV 17 1947
 1160-10
 7694

EXPENSE CASE 59364
 RECEIVED
 NOV 4 1947
 LOS ANGELES
 OFFENSE-RENTAL-AREA
 OFFICE OF PRICE ADMINISTRATION
 UNITED STATES OF AMERICA
 FORM APPROVED
 RECENT BUREAU NO. 18-1
 FORM D-11-D
 AREA OFFICE COPY

Production of Hotels, Rooming Houses, Boarding Houses, Dormitories, Auto
 and Residence Clubs, Tourist Homes and Cabins, and Trailer Camps
 (TYPE OR PRINT PLAINLY - DO NOT FOLD)
 Please Read the Instructions Carefully Before Filling Out This Registration Statement

SECTION A - IDENTIFICATION

- This establishment is a:
 Hotel ☐ Trailer Camp ☐
 Rooming House ☐ Residence Club ☐
 Boarding House ☒ Tourist Home ☐
 Dormitory ☐ Tourist Cabin ☐
 Auto Camp ☐
- Total Number of Rooms for Rent: 6
- Total Number of Occupants
 When Fully Rented: 2
- Total Number of Bathrooms: 1
- Was the taking of meals required as a condition of
 renting any room in this establishment on June 15,
 1947? Yes ☒ No ☐

- Name of Establishment:
 Street Address: 3515 E. 42nd St
- Elmer T. Gehrig, Manager
 NAME OF LANDLORD
451 E 43rd St
 STREET ADDRESS
Los Angeles, Calif
 CITY AND STATE
- 451 E 43rd St
- Los Angeles, Calif
- Did this establishment rent rooms or offer them
 for rent on March 1, 1942?
 Yes ☒ No ☐

If the answer is "no", on what date did this
 establishment first offer rooms for rent after
 March 1, 1942?
October 1943

SECTION B - MAXIMUM LEGAL RENTS FOR ROOMS RENTED OR OFFERED FOR RENT

Note: If the room was actually rented at the rent reported and not merely offered for rent,
 indicate by placing an "X" in the box after the amount.
 If there was only a single rate covering both room and meals, apportion the total charge be-
 tween a charge for meals and a charge for room rent. The apportionment must be fair and reason-
 able. ENTER ONLY THE CHARGE FOR ROOM RENT.

- Are any of the rents entered below apportioned from a single charge for room and meals? Yes ☐ No ☒
- Schedule of maximum legal rents.

Room Num- ber and Location	DAILY RATE		WEEKLY RATE		MONTHLY RATE	
	one person	three persons	one person	three persons	one person	three persons
1						
2						
3						
4						
5						
6						

If additional space is required, continue on the back of this form.

WARNING

The rates reported in Section B are the Maximum Legal Rents which may be charged. Any charge in
 excess of those rates, unless previously authorized in accordance with the Maximum Rent Regulation, may sub-
 ject you to a \$5,000 fine or imprisonment for one year, or both, and to damages payable to the tenant amounting
 to three times the overcharge, plus attorney's fees. A false statement on this form may subject you to a \$5,000
 fine or imprisonment for one year, or both.

I HEREBY REPRESENT that all statements and entries given hereon or attached hereto are true and
 correct.

Elmer T. Gehrig
 Signature of Landlord or the Agent

INFORMATION REGARDING HOTELS AND ROOMING HOUSES

Street Address of Property Concerned _____

Landlord's Name _____

Landlord's Address _____

Telephone _____

1. Has this property ever been registered on a housing form? Yes When? 4-2
2. Are all of the rooms fully furnished? Yes
3. Which of the following does the landlord furnish if included in the rent?
Utilities _____, Linens _____, Laundry _____, Maid Service Yes
4. How often are linens and laundry furnished by the landlord? Once
5. How often is maid service given by the landlord? Once
6. Are any of the occupants on the premises related by blood or marriage?
Which rooms do these persons occupy? None
What is the relation? (blood or marriage) _____
7. How many of the present tenants have lived there for more than 60 days? 2
How many of the present tenants have lived there for more than three weeks? 3
8. Does the landlord or his agent live on the premises?
If not, where does the landlord live? Not applicable
9. Are cooking facilities provided by landlord? Yes If so, state the kind
Underline which of the following are provided by the landlord:
STOVE, REFRIGERATOR OR ICE BOX, COOKING UTENSILS, DISHES, SILVERWARE
10. How many persons have the right to use these cooking facilities? all
11. How many baths are located on the premises?
How many toilets are located on the premises? 1
12. What is the approximate age of property? _____
13. On the reverse side of this sheet the informant should submit a rough floor plan or diagram of the accommodations showing:
 - (a) Each sleeping room
 - (b) Each bath-room including the connecting doorways
 - (c) Location of kitchen
 - (d) Location of hallways, living room or other spaces used in common by all tenants.

Name of Person Giving Information Elmer H. HaysDate 8-2-47

Bath	Summer
Lower	Kitchen
Good	White
More	Jane
1	2
4	3
5	6

DATE 3/14/47

GENERAL INSTRUCTIONS

The landlord is required to register separately each rental dwelling unit. The landlord is required to complete a separate section of this form for each rental unit. A dwelling unit is a separate structure or part of a structure which is occupied by one or more persons and is used for residential purposes. It is not a garage, workshop, or other structure used for business or industrial purposes. It is not a rooming house or a transient dwelling. It is not a rooming house or a transient dwelling. It is not a rooming house or a transient dwelling.

Use extra sheets, in triplicate, for sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

SECTION A. MAILING ADDRESS OF LANDLORD

1 Name _____
2 Name _____
3 Address _____
City _____ State _____
Name _____
Address _____
City _____ State _____

SECTION B. MAILING ADDRESS OF TENANT

1 Name _____
2 Name _____
3 Address _____
City _____ State _____
Name _____
Address _____
City _____ State _____

SECTION C. MAXIMUM LEGAL RENT

and all activity item which applies to this dwelling unit.

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UNITED STATES OF AMERICA

OFFICE OF PRICE ADMINISTRATION

REGISTRATION OF RENTAL DWELLINGS

(TYPE OR PRINT PLAINLY - DO NOT FOLD)

Do Not Use This Form for Hotels and Rooming Houses

Form Approved
January 1942 Edition
Form DD 6-D
AREA OFFICE
COPY

SECTION D. IDENTIFICATION

1. 337 E 42nd St.
Address of the rental dwelling
2. Apartment number or location
3. Number of Rooms in this dwelling unit
4. Total Number of dwelling units in this structure

SECTION E. MAILING ADDRESS OF TENANT

Name of Tenant
337 E 42nd St.
Address
Los Angeles, Cal.
City and State

SECTION F. EQUIPMENT AND SERVICES

(Check the equipment and services included in the rent on March 1, 1942 on the most recent statement entered in Section 5)

1. EQUIPMENT
Furniture ()
Running Water ()
Hot Water ()
Flush Toilet ()
Bathroom ()
Central Heating ()
Heating Stove ()
Mech. Refrigerator ()
Electricity Installed ()
Cooking Stove ()
If any equipment is shared, explain below
2. SERVICES
Garage ()
Heat or Heating Fuel ()
Cooking Fuel ()
Cold Water ()
Hot Water ()
Light ()
Ice or Refrigeration ()
Janitor Service ()
Garbage Disposal ()
Painting & Decorating ()
Interior Repairs ()
Exterior Repairs ()
List any other services:

3. SERVICES
Garage ()
Heat or Heating Fuel ()
Cooking Fuel ()
Cold Water ()
Hot Water ()
Light ()
Ice or Refrigeration ()
Janitor Service ()
Garbage Disposal ()
Painting & Decorating ()
Interior Repairs ()
Exterior Repairs ()
List any other services:

SECTION G. See Note Section C, 7.

1. Section was filled in, set forth in specific detail the type and cost of:
(a) Change from unfurnished to fully furnished
(b) Change from unfurnished to fully furnished
(c) A change from unfurnished to fully furnished
(d) A major capital improvement

WARNING:

The rent for this dwelling entered on this form after November 1, 1942 can be no more than the Maximum Legal Rent entered in the Statement of Maximum Legal Rent for this dwelling on the form entered in the Statement of Maximum Legal Rent Regulation may subject you to the penalties of the Maximum Legal Rent Regulation if you fail to comply with its provisions. It is your responsibility to see that all statements and entries given herein are true and correct.

3/14/47 H. H. H. H. H.
Signature of Landlord or Agent

Hague, Ed
Mr. A
Nov 17 1947
179 c

FORM APPROVED
 BUREAU NO. 18-108-02
 FORM 1011-13
 LANDLORD'S COPY

UNITED STATES OF AMERICA

OFFICE OF PRICE ADMINISTRATION

RECEIVED
 Registration of Hotels, Rooming Houses, Boarding Houses, Dormitories, Auto
 Camps, Residence Clubs, Tourist Homes and Cabins, and Tourist Camps

RECEIVED
 NOV 17 1947
 92A

MAR 4 1947
 (TYPE OR PRINT PLAINLY - DO NOT FOLD)
 Please Read the Instructions Carefully Before Filing
 Out This Registration Statement

SECTION A - IDENTIFICATION

- This establishment is a:
 Hotel ☐ Trailer Camp ☐
 Rooming House ☐ Residence Club ☐
 Boarding House ☐ Tourist Home ☐
 Dormitory ☐ Tourist Cabin ☐
 Auto Camp ☐
- Total Number of Rooms for Rent: 6
- Total Number of Occupants
 when Fully Rented: 6
- Total Number of Bathrooms: 1
- Total taking of meals required as a condition of
 renting any room in this establishment on June 15,
 1947? Yes ☐ No ☒
- Did this establishment rent rooms or offer them
 for rent on March 1, 1942?
 Yes ☒ No ☐

If the answer is "no," on what date did this
 establishment first offer rooms for rent after
 March 1, 1942?
October 1942

SECTION B - MAXIMUM LEGAL RENTS FOR ROOMS RENTED OR OFFERED FOR RENT

Note: If the room was actually rented at the rent reported and not merely offered for rent,
 indicate by placing an "X" in the box after the amount.
 If there was only a single rate covering both room and meals, apportion the total charge be-
 tween a charge for meals and a charge for room rent. The apportionment must be fair and reason-
 able. ENTER ONLY THE CHARGE FOR ROOM RENT.

- Are any of the rents entered below apportioned from a single charge for room and meals? Yes ☐ No ☒
- Schedule of maximum legal rents.

Room Num- ber Location	one person	two persons	three persons	one person	two persons	three persons	one person	two persons	three persons	MONTHLY RATE
1										
2										
3										
4										
5										
6										

If additional space is required, continue on the back of this sheet.

WARNING

The rates reported in Section B are the Maximum Legal Rents which may be charged. Any charge in
 excess of those rates, unless previously authorized in accordance with the Maximum Rent Regulation, may sub-
 ject you to a \$5,000 fine or imprisonment for one year, or both, and to damages payable to the tenant amounting
 to three times the overcharge, plus attorney's fees. A false statement on this form may subject you to a \$5,000
 fine or imprisonment for one year, or both.

I HEREBY REPRESENT that all statements and entries given hereon or attached hereto are true and
 correct.

Signature of Landlord or his Agent

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial November 17, 1947, before the above entitled Court, the Honorable Ben Harrison, Judge Presiding, Sherman Grancell, Esq., appearing as attorney for the plaintiff, and Marshall Denton, Jr., Esq., appearing as attorney for the defendants; evidence both oral and documentary having been introduced by the plaintiff and the defendants, and the cause having been submitted, the Court now makes the following:

FINDINGS OF FACT

1. That plaintiff, as Housing Expediter, Office of the Housing Expediter, brings this action for injunction pursuant to Section 205(a) to enforce compliance with Section 4 and for treble damages on behalf of the United States of America pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., hereinafter referred to as "The Act," and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator pursuant to Section 2 of the Act. [18]

2. That jurisdiction of this action is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

3. That at all times mentioned herein, there has been and now is in effect a Rent Regulation for Housing issued pursuant to Section 2(b) of the Act for the Los Angeles Defense Rental Area.

4. That the defendants are residents of the City of Los Angeles, County of Los Angeles, State of California, in the Southern District of California, in the Central Division thereof, and within the jurisdiction of this Court.

5. That during all times herein mentioned defendants have received rent for the use and occupancy of those certain housing accommodations, subject to said Housing Regulation within said Defense Rental Area, known and described as 337 East 42nd Street, Los Angeles, California.

6. That since June 6, 1946, exclusive of the period July 1 to July 25, 1946 inclusive, defendants have received for the use and occupancy of the housing accommodations hereinabove described, rents in excess of the maximum rents permitted under the said Rent Regulations and Orders of the Rent Director; that the number and names of tenants and the amount of overcharges are as follows:

Tenant's Name	Period of Time	Rent Paid Per Week	Maximum Legal Rent	Over-charge
Willie B. James.....	6/6/46 - 4/ 7/47	\$8.50	\$5.00	\$112.00
Artie Mae Moore.....	6/6/46 - 3/ 8/47	8.50	5.00	98.00
Eloise Sadler	6/6/46 - 3/ 7/47	8.50	5.00	98.00
Tela Grant	6/6/46 - 3/13/47	8.50	5.00	101.50
Total Overcharges				\$409.50

7. That every tenant overcharged as above alleged has failed to institute an action pursuant to Section 205(e) of said Act, and more than thirty days have elapsed since the occurrence of the violations.

8. That defendants have engaged in and are continuing to engage in actions and practices in violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended. [19]

9. That the violations hereinbefore set forth were wilful.

From these findings of fact, the Court now makes the following

CONCLUSIONS OF LAW

1. That plaintiff is entitled to have judgment against the defendants in the sum of \$409.50.

2. That the defendants are ordered to tender refunds to the tenants named in Paragraph 6 in the amounts set forth in said paragraph through the office of the plaintiff.

3. That the plaintiff is entitled to an injunction against the defendants as prayed for in the complaint.

4. That the action is not barred by the statute of limitations.

Dated at Los Angeles, California, this 26th day of November, 1947.

/s/ BEN HARRISON,
Judge United States
District Court.

Approved:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
SHERMAN GRANCELL,
By /s/ SHERMAN GRANCELL,
Attorneys for Plaintiff.

Approved:

MARSHALL DENTON, JR.,
Attorney for Defendants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Dec. 1, 1947. [20]

In the District Court of the United States for the
Southern District of California, Central Division
No. 7094-B

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff.

vs.

LILLIE T. HOGUE, ELIAS HOGUE, DOE I
and DOE II,

Defendants.

JUDGMENT, ORDER AND DECREE

This cause having come on for trial November

17, 1947 before the above entitled Court, the Honorable Ben Harrison, Judge Presiding, Sherman Grancell, Esq., appearing as attorney for the plaintiff, and Marshall Denton, Jr., Esq., appearing as attorney for the defendants, evidence both oral and documentary having been adduced by the plaintiff and the defendants, and the cause having been submitted; the Court having made its findings of fact and conclusions of law, it is hereby:

Ordered, Adjudged And Decreed:

1. That plaintiff have judgment against the defendants in the sum of \$409.50.
2. That the defendants are ordered to tender refunds to the following named tenants in the following sums, through the office of the plaintiff.

Willie B. James, \$112.00

Artie Mae Moore, \$98.00

Eloise Sadler, \$98.00

Tela Grant, \$101.50

3. That the defendants, their agents, servants, employees, and all persons in active concert with them are enjoined from demanding rent in excess of the sum of \$5.00 per week for each of the rooms located in the housing accommodations at 337 East 42nd Street, Los Angeles, California, unless and until such time as the maximum legal rent of said rooms is increased by the Office of the Housing Expediter, through proper orders or authorizations.

4. That the defendants, their agents, employees and all persons in active concert with them are further enjoined from otherwise violating the Housing and Rent Act of 1947, and the Controlled Housing Rent Regulation issued pursuant to said Act as said Act and Regulation now exists or as they may be hereafter amended or extended.

Dated: November 26, 1947.

/s/ BEN HARRISON,

Judge United States

District Court.

Approved:

ABE I. LEVY,

STEPHEN D. MONAHAN,

FRANK L. HIRST,

SHERMAN GRANCELL.

By /s/ SHERMAN GRANCELL.

MARSHALL DENTON, JR.,

Attorney for Defendants.

[Endorsed]: Filed. Judgment entered and Docketed Dec. 1, 1947., Book C. O. 47, Page 161.

[Affidavit of service by mail attached.] [23]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, Central Division:

Notice Is Hereby Given that Lillie T. Hogue and Elias Hogue, defendants herein, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment and the whole thereof entered in this action on the 1st day of December, 1947.

/s/ MARSHALL DENTON, JR.,
Attorney for Defendants,
Lillie T. Hogue and
Elias Hogue.

[Endorsed]: Filed and mailed copy to Abe I. Levy, attorney for plaintiff, Jan. 30, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Following is a statement of the only point relied upon by defendants and appellants on Appeal:

Is a rent ceiling Order of the Housing Expediter, which fixes a rent ceiling of \$5.00 per week, for a room occupied by one (1) tenant, for living purpose, violated where the landlord charges and collects more than \$5.00 per week, when such room is occupied by more than one (1) tenant?

/s/ MARSHALL DENTON, JR.,
Attorney for Defendants
and Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 27, 1947. [26]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Honorable District Court of the United
States for the Southern District of California:

Lillie T. Hogue and Elias Hogue, defendants and
appellants herein, hereby designate the following
matters and proceedings be included in the Record
on Appeal herein:

1. The Complaint.
2. The Answer.
3. All Oral testimony, whether admitted or re-
jected.
4. All Exhibits offered or admitted into evidence.
5. Findings of Fact and Conclusions of Law.
6. The Judgment.
7. The Notice of Appeal.

/s/ MARSHALL DENTON, JR.,
Attorney for Defendants
and Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 27, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF MARSHALL DENTON, JR.,
IN SUPPORT OF EX-PARTE MOTION
FOR EXTENSION OF TIME TO FILE
RECORD ON APPEAL

State of California,
County of Los Angeles—ss.

Marshall Denton, Jr., being first duly sworn,
deposes and says:

That affiant herein is the Attorney of Record
for Lillie T. Hogue and Elias Hogue, defendants
and appellants in the above-entitled matter.

That Notice of Appeal was filed herein on January
30th, 1948.

That the time for filing the Record on Appeal
herein expires on March 10th, 1948, unless extended
by an order of the above-entitled court.

That since the filing of the said Notice of
Appeal, affiant herein has been unable to fully
complete the said record because of almost continuous
court trials; that said affiant has no legal partner
or associate and therefore has to devote his
personal attention to all legal matters in said
affiant's office.

That said affiant believes and therefore alleges
that he will be [30] able to complete, file and serve
said record in time for the same to be ready for
filing on or before April 1st, 1948, and for such
purpose said affiant believes it to be equitable and
just that an order of this court issue extending the

time herein for the aforesaid purpose to April 1st, 1948.

Wherefore, affiant respectfully prays for an Order of Court extending the time for filing the Record on Appeal herein to April 1st, 1948, and for such other and further relief as may appear just and equitable herein.

/s/ MARSHALL DENTON, JR.,
Affiant.

Subscribed and sworn to before me this 10th day of March, 1948.

[Seal] /s/ STELLA WOOD,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 30, 1948.

[Endorsed]: Filed March 10, 1948. [31]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

Having read the sworn affidavit of Marshall Denton, Jr., Esq., Counsel for Appellants in the above-entitled matter, and good cause appearing therefor,

It Is Hereby Ordered that the time for filing the Record on Appeal herein be and is hereby extended to April 1st, 1948.

Dated: At Los Angeles, California, this 10th day of March, 1948.

/s/ C. E. BEAUMONT,

Judge of the District Court of the United States
for the Southern District of California.

[Endorsed]: Filed March 10, 1948. [32]

[Title of District Court and Cause.]

AFFIDAVIT OF MARSHALL DENTON, JR.,
IN SUPPORT OF EX-PARTE MOTION
FOR EXTENSION OF TIME TO FILE
RECORD ON APPEAL

State of California.

County of Los Angeles—ss.

Marshall Denton, Jr., being first duly sworn, deposes and says:

That affiant herein is the Attorney of Record for Lillie T. Hogue and Elias Hogue, defendants and appellants in the above-entitled matter.

That Notice of Appeal was filed herein on January 30th, 1948.

That heretofore an Order was made extending time for filing the Record on Appeal herein to April 1st, 1948.

That efforts have been made herein to use an agreed statement of the case in lieu of a transcript of the testimony; that after the preparation, by affiant, of such proposed agreed statement and the submission thereof to plaintiff herein, for consid-

eration and signature, it was discovered that Sherman Grancell, Esq., counsel who represented plaintiff at the trial of the above-entitled cause [33] was no longer in the service of the government of the United States, hence said statement could not be agreed upon and it has now become necessary to request a preparation of the transcript by the shorthand reporter who recorded the proceedings; that affiant has been informed and believes and therefore alleges that said transcript and copy will be ready on or about April 8th, 1948.

That an extension of time herein to April 30th, 1948, will be adequate to complete the record on appeal herein.

Wherefore, affiant respectfully prays for an Order of Court extending the time for filing the Record on Appeal herein to April 30th, 1948, and for such other and further relief as may appear just and equitable herein.

/s/ MARSHALL DENTON, JR.,
Affiant.

Subscribed and sworn to before me this 31st day of March, 1948.

[Seal] /s/ STELLA WOOD,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 30, 1948.

[Endorsed]: Filed April 1, 1948. [34]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

Having read the sworn affidavit of Marshall Denton, Jr., Esq., Counsel for Appellants in the above-entitled matter, and good cause appearing therefor,

It Is Hereby Ordered that the time for filing the Record on Appeal herein be and is hereby extended to April 15th, 1948. J.W.

Dated: At Los Angeles, California, this 1st day of April, 1948.

/s/ JACOB WEINBERGER,

Judge of the District Court of the United States
for the Southern District of California.

[Endorsed]: Filed April 1, 1948. [35]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 35, inclusive, contain full, true and correct copies of Complaint for Treble Damages and Injunction; Bill of Particulars; Answer to Complaint for Treble Damages and Injunction; Plaintiff's Exhibit No. 1; Defendants' Exhibit A; Findings of Fact and Conclusions of Law; Judgment, Order and Decree; Notice of Appeal; Statement of Points on Appeal; Designation of Record

on Appeal and two Affidavits for Extension of Time to File Record on Appeal and Orders Extending Time which, together with copy of reporter's transcript of proceedings on November 17, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$9.90 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 13th day of April, A.D. 1948.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

In the District Court of the United States, Southern
District of California, Central Division

No. 7094-B

FRANK R. CREEDON, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

LILLIE T. HOGUE, ELIAS HOGUE, DOE I,
DOE II,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

November 17, 1947

Appearances:

For the Plaintiff: Austin Clapp, by Sherman
Grancell, 1206 Santee Street, Los Angeles, Cali-
fornia.

For the Defendants, Hogue: Marshall E. Denton,
Jr., 3519 South Central Avenue, Los Angeles, Cali-
fornia. [1*]

The Clerk: 7095-B, Civil. Frank Creedon vs.
Lillie T. Hogue, et al.

Mr. Grancell: Ready for the plaintiff.

Mr. Denton: Defendant is ready, your Honor.

The Court: What facts can you gentlemen stip-
ulate to?

* Page numbering appearing at top of page of Reporter's certified
Transcript of Record.

Mr. Grancell: First, I would like to move for the substitution of Tighe E. Woods, instead of Frank R. Creedon.

Mr. Denton: I have no objection to the motion.

Mr. Grancell: I don't know whether we can reach any stipulation as to the amount of rent paid. Have you any suggestion along that line? We served a Bill of Particulars in this case.

The Court: As I understood counsel in chambers the other day there is no dispute as to the ceilings.

Mr. Denton: Not at all, your Honor.

The Court: The dispute is as to amount.

Mr. Denton: If the Court permits me, I think I can clarify that and cut this thing pretty short.

The Court: Yes.

Mr. Denton: We will stipulate that this defendant here has for the period during which the various parties named in the complaint—not in the complaint, but in the more definite statement, Bill of Particulars—we don't have the exact date [2] of occupancy of these different tenants named in the Bill of Particulars. We will stipulate for the period of time that Willie B. Jones, Artie Mae Moore and Mrs. Eloise Sadler, named in the Bill of Particulars, during the time they were in possession and were tenants of this defendant here—and also Tela Grant on page 2—this defendant did collect \$10.00 per week and \$8.50 per week, respectively.

The exact period of time over which these various rents were paid by these individuals we don't have now.

The Court: How about this Miss Louise?

Mr. Denton: I was going to call the Court's attention to that. This Miss Louise named at Room No. 3 is the same party as Eloise Sadler appearing on page 1, as occupying Room No. 5.

Mr. Grancell: I think counsel probably is correct in that. At least, we haven't been able to find anybody by the name of Miss Louise.

Mr. Denton: The only issue here is we have here a copy of the rent registration as of March 1, 1947, showing these premises to have been registered. I assume counsel has the original of this. I will be glad and happy to let him see our copy in which the ceiling provided Rooms 1 to 6, inclusive,—perhaps I should break it down. In Room No. 1 it says \$5.00, and they have a pencil mark drawn through that amount.

Then we jump down to Room 6. They have \$4.00, and they have a lead pencil mark through that. [3]

As to Rooms Nos. 2, 3, 4 and 5, it shows a ceiling of \$5.00 per week *for* person.

Our position is these rents were collected but instead of being one person in the room here, the rent collected was based upon an occupancy in each room by people in excess of the one. That is our sole defense here.

Mr. Grancell: If your Honor please, concerning the maximum rent, the reason why, as to Rooms Nos. 1 and 6, the original shows the—

The Court: You have not anything on Room No. 6 in this Bill of Particulars.

Mr. Denton: There is none in the Bill of Par-

ticulars; just on the registration. That wouldn't be an issue.

Mr. Grancell: As to Room No. 1, you will notice the notation on your copy there "on DDU," and that means there is a separate individual registration filed for that room No. 1, which I have here. It shows that the maximum rent for that room is the same, \$5.00 per week.

Mr. Denton: Was that in excess of more than the one person?

Mr. Grancell: There is no indication on this original registration as to the number of persons.

Now, if counsel will agree to that fact, that that maximum rent for that Room No. 1 is \$5.00 per week, then we can get to this question as to the occupancy proposition. [4]

Now, I am assuming that the amount of rents collected will not be subject to proof. In carrying this argument forward here, I think we might, by stipulation, introduce the original registration so the Court will have those before it, while we discuss this.

Are you willing to stipulate to the introduction of the registration?

Mr. Denton: I have no objection.

Mr. Grancell: We offer these in evidence as plaintiff's Exhibit 1.

Mr. Denton: Along with that stipulation, to admit those records, may we state in that connection here that the only copy or notice this defendant has had of this registration is the copy we have here which I have shown to counsel and on which ap-

peared the information I read to the Court in my opening statement.

Mr. Grancell: I think that your copy is correct. You are probably referring to the provision in No. 3 of the main registration form, the large one on which all the units are located. The total number of occupants when fully rented is what you are referring to?

Mr. Denton: Yes.

Mr. Grancell: As six?

Mr. Denton: Yes.

The Court: What would be the effect of the registration [5] for one person and their being no rates fixed for more than one? Take, for instance, Room No. 1.

Mr. Grancell: I submit to the Court that under the regulation the defendant in this case has the same right that every other person has, every other landlord where there is an increased occupancy, to petition for increased rent, based on that increased occupancy. That is covered by the rent regulation for housing in existence at the time of the violation here involved, the 10FR-13A-528 Section here, on grounds for petitions for increase of rent.

The Court: You have three tenants involved, have you not?

Mr. Grancell: Yes, sir, your Honor. Actually, there are four. I think you also—how about Moore? I think you also—

Mr. Denton: Your Honor, may I comment on

counsel's reply to the Court's query with reference to if there is no other——

Mr. Grancell: Let me cover it.

Mr. Denton: I thought you were through. Pardon me.

Mr. Grancell: Section 5, which is as to adjustments and other determinations—if the Court will pardon me just a second I will locate this paragraph.

Section 5, A(8), "Substantial increase in occupancy." The paragraph reads as follows:

"There has been, since the maximum rent date, either 1, a substantial increase in the number of subtenants or other persons occupying the accommodations or a part thereof, under a rental agreement with the tenant, or

"2. A substantial increase in the number of occupants in excess of normal occupancy for that class of accommodations on the maximum rent date, or

"3. An increase in the number of occupants over the number contemplated by the rental agreement on the date determining the maximum rents where the landlord on that date had a regular and definite practice of fixing different rents for the accommodations for different numbers of occupants."

If any one of those things occur under this Section 5 the landlord has the right to petition for an increased rent, and as a result of such petition an occupancy order may be issued permitting a rent increase of, say \$2.00 or \$2.50 or \$5.00 per week

for each additional person in excess of a certain number. Failing to do that, I submit to the Court the landlord is bound by the maximum rent set forth in the registration.

The Court: Now, counsel, were you claiming for more than one? Four in all?

Mr. Denton: Yes. Not only the rooms in issue, but every one involved. The citation of the section counsel referred to has to do with dwellings and apartments. That section has nothing to do with an apartment, a dwelling or a room wherein the O.P.A. or the Rent Director has fixed by a definite order the maximum rent for specified number of persons.

Here on this regulation, a copy of which I have shown [7] counsel, they have provisions printed there to take care of two, three, up to three people in an individual room. If we agree with counsel here that he can come in, upon a complaint, and allege a violation based upon a specific order, and then point out to the Court since there is a possibility of this defendant having a definite rate fixed for a number in excess of that set forth in the order, and that constitute a violation, I cannot agree with him.

We are here upon an alleged definite violation. We have an order wherein the Director has fixed the definite amount of rent for one occupant. It is my view, in order to attempt to hold this defendant for a violation, there must be an order. If we can support our position, if there was an occupant in excess of one in each room, we must first bring into this Court an order that has been made by the

Rent Director, establishing a rental ceiling for the number of the particular occupants of that room, and showing this defendant has overcharged for that particular number of occupants.

The Court: Well, counsel, this is an action in equity, is it not?

Mr. Grancell: It is both equitable and an action at law. It is an action at law for treble damages.

The Court: Recovery for one year. It is for one year. This action was all within one year. An equitable action to recover for more than one year? [8]

Mr. Grancell: That is right. As far as the restitution features are concerned, that is an equitable action.

The Court: You will have to go back to 1945.

Mr. Grancell: Well, that is true. You are correct in that.

The Court: As a matter of fact, the action was not filed until July 23rd.

Mr. Grancell: The action was filed June, 1947.

The Court: To a marked extent these are within the one-year period. There is only a small amount in the one-year period.

Mr. Grancell: That is right.

The Court: Now, equitable powers, if it would appear to be an order for one tenant, and two or three people occupied the room, I would consider it unfair. I was just wondering if you people could not agree on amounts here and both give and take. What is your attitude?

Mr. Denton: Well, I don't know in that particular, your Honor. I might state this fairly to the

Court: I came into Court to do the right thing. These people—this was formerly their home and they moved out from the same facilities they enjoyed, which were nice, Frigidaires and linen and what have you went with it. There have been two people, sometimes three before trying to charge \$10.00 a week. Before the action was contemplated to be brought, they reduced the rent with the same people there.

The Court: I am inclined to believe that counsel for the government is correct. When an order is made for one person, if you add more than one person, then the burden is shifted to the landlord to get a readjustment of the rent.

I have here on one side a question of law and on another side a question of equity. This landlord, when he had more people in there than indicated, had a duty. It seems to me that the parties themselves might do a better job in this matter than the Court. Whatever the Court does is going to have to be arbitrary, in a sense.

Mr. Denton: The only thing I might suggest is to ask leave of the Court for a short recess and to talk to counsel for the government and see what we can arrive at.

The Court: If I have to determine how many people should be in these rooms, it will not take me long to determine it.

Mr. Grancell: I think if we take a few minutes' recess, your Honor, we may be able to wind this up.

The Court: Maybe this party cannot stand such an exorbitant amount as you ask.

Mr. Grancell: We are willing to talk.

The Court: We will take a 10-minute recess.

(Short recess taken.)

The Court: All right, gentlemen.

Mr. Grancell: Your Honor, we were unable to reach a [10] settlement. We were unable, as a matter of fact, to even reach a stipulation on the overcharges involved. We will have to prove our case.

I will call the defendant under Rule 43-B.

E. H. HOGUE

a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name?

The Witness: Reverend E. H. Hogue.

Q. (By Mr. Grancell): Reverend Hogue, do you own the property at 337 East 42nd Street, in the City of Los Angeles? A. I do.

Q. Now, how long have you owned that property? A. Since '41.

Q. Since 1941? A. Since '41, 1941.

Q. Now, in May, or on May 22, 1945, you rented Room No. 2 to Willie B. James, did you not?

A. It wasn't any number on the room. I don't know what room—there wasn't any number on the rooms at all.

Q. That was a room that—was that a front room or a rear room?

A. I think it was a side room, I believe. It

(Testimony of E. H. Hogue.)

wasn't a [11] front room. They moved out of one room to the other.

Q. Now, you rented that to James at \$10.00 a week, did you not?

A. Yes, her and her husband.

Q. You collected \$10.00 a week from James up until April 1, 1946, did you not?

A. I didn't keep an account of just how long it was.

Q. Was it about the first of April of 1946?

A. April or March, somewhere along there. I don't know just how long it was. I didn't keep an account of it.

Q. Would you say that date is approximately correct? A. What say?

Q. Would you say that date is approximately right, April 1, 1946?

A. Could be or could not be; I don't know whether it is right or not.

Q. After that you collected \$8.50 from that tenant, did you not?

A. From the two in that room, whatever room they were in. They didn't stay in any particular room, when one moved out, somebody changed.

Q. You collected \$8.50 from James up to April 7, 1947, when they moved out, isn't that correct?

A. April 7th?

Q. Yes. [12]

A. I didn't keep account of when she moved out. She did move out sometime in the Spring, after this happened.

(Testimony of E. H. Hogue.)

Q. Was it around the first part of April?

A. Somewhere along there.

Q. 1947?

A. I don't know the date. I didn't keep up with it.

Q. Artie Mae Moore, you rented a front room No. 1 to Artie Mae Moore on or about November 1, 1944, did you not?

A. She wasn't there then. She didn't live in that room. It is numbered 1 now, but she didn't live in that room.

Q. A front room. Don't bother about the details.

A. She didn't live in that room until sometime last Fall.

Q. You rented a room to Artie Mae Moore in November, 1944?

A. Yes, to her and her husband.

Q. At \$10.00 a week?

A. Yes, for her and her husband.

Q. You collected \$10.00 a week from Artie Mae Moore from November, 1944 to April, 1946, did you not, \$10.00 per week?

A. 1946? I disremember. I don't think it was that long, but I am not positive. I didn't keep account of how long it was.

Q. From April, 1946 to March 8, 1947, isn't it a fact that you collected \$8.50 per week from Artie Mae Moore?

A. I collected \$8.50 a week for her and her husband for that time. [13]

(Testimony of E. H. Hogue.)

The Court: How many people were occupying the room with Willie B. James?

The Witness: That is her and her husband.

The Court: There were two there?

The Witness: Yes.

The Court: Do you have any record when they moved in or when they moved out?

The Witness: No, I have no record. I didn't keep no kind of records when they moved in. Whenever they paid me, that was through for that week. I didn't even give a receipt or nothing. I didn't have no record of when they moved or just when they moved in.

Q. (By Mr. Grancell): Now, as to both Willie B. James and the husband, or wife there, you say the couple were in there all the time, were they not?

A. Yes.

Q. All the time from the time you first rented the place? A. Yes.

Q. The same is true of Artie Mae Moore, that couple was there, both husband and wife, all the time?

A. They were there all the time. He was on the road, of course, but you know how that was.

Q. They were both there all the time?

A. Yes.

Q. Mrs. Eloise Sadler, did you rent Room No. 5 or a rear [14] room to Mrs. Eloise Sadler about November 1, 1946?

A. Like I said, I don't know how long it was. I did rent her the room for her and her husband.

(Testimony of E. H. Hogue.)

Q. At \$10.00 per week?

A. For a while they did have it for \$10.00.

Q. Was that January 1, 1946, when the Sadlers moved in?

A. Well, I am not certain. I don't know just how long. Sometime during last year, I don't know what time. I didn't keep a record of it.

Q. Now, from April 1, 1946, to March 7, 1947, did you collect \$8.50 per week from Mr. and Mrs. Sadler?

A. Yes, I did.

Q. Both Mr. and Mrs.?

A. I don't know the length of time, but I did.

Q. The couple were both there, Mr. and Mrs. Sadler, according to you, were in there all the time?

A. Why, sure.

Q. Mrs. Tela Grant, did you rent a back room to Tela Grant on or about December 2, 1945?

A. Well, I don't know what date it was. I rented it to her and her daughter.

Q. For her and her daughter?

A. Yes. Otherwise, there was somebody else there part of the time.

Q. At \$10.00 a week? [15]

A. Yes.

Q. Did you collect \$10.00 per week from Mrs. Tela Grant until April 1, 1946?

A. I reckon. I don't know what date it was. I didn't keep up with the dates of it. I collected \$10.00 for a while.

Q. You collected \$8.50 from Mrs. Grant after April 1, 1946 to March 13, 1947, did you not?

A. Somewhere along that time, for the two.

(Testimony of E. H. Hogue.)

The Court: What happened when you reduced all these rents to \$8.50?

The Witness: Some of them were complaining, said their jobs wasn't so good. I felt like I could help some by reducing their rent.

The Court: You knew you were charging over the ceiling, didn't you?

The Witness: No. I knew I could charge \$5.00 for one, and I didn't have nothing else. I just decided it would be right to get that much for two.

The Court: How about Mrs. Louise?

The Witness: That is the same one.

The Court: Was she alone?

Mr. Grancell: I think, if your Honor please, that Mrs. Louise is Eloise Sadler. I think our office got that a little mixed up.

The Court: Do you want that eliminated? [16]

Mr. Grancell: Yes, we will eliminate that. Shall I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Grancell): Mrs. Grant and her daughter—was her daughter with her all the time while she was living in that place? A. Yes.

Q. They were both there when you rented the room to them? A. Yes.

Q. What is your business or occupation, Reverend Hogue?

A. I haven't worked for anybody in a couple of years. I was too old, nobody wanted me.

Q. What was your occupation before that?

A. I worked at North American while the war was going on for 18 months.

(Testimony of E. H. Hogue.)

The Court: North American?

The Witness: Aviation.

Q. (By Mr. Grancell): Now, Reverend, I show you plaintiff's Exhibit 1 and ask you if this is your signature on each one of these documents here (indicating). Would you check these and take a look at them and see if that is your signature?

Reverend Hogue, are those your signatures on each one of those documents? A. Yes. [17]

Q. I call your attention to this first document, Form D, which is stamped "Received March 4, 1947, Los Angeles Defense-Rental-Area," and ask you if you filed this document with the Los Angeles Defense-Rental-Area office on or about March 4, 1947?

A. I didn't know——

The Court: That is stipulated to, is it not?

Mr. Denton: Yes.

Mr. Grancell: The introduction of the document was stipulated to. I wanted to get this date before the Court specifically.

Mr. Denton: The documents speak for themselves.

Mr. Grancell: I am asking him when he filed it, if he filed it about that day.

Mr. Denton: The Court inquired about it.

The Court: The record speaks for itself.

Q. (By Mr. Grancell): At the time you filed this DH-D form, the first one of these, in which you set forth these rents, \$5.00 for each one of these rents and \$4.00 for the last, Room 6, at that time

(Testimony of E. H. Hogue.)

each one of these rooms, according to your testimony was being occupied by two or more people?

A. Yes.

Q. You did not specify in here a rate for two or three people, did you? A. I didn't—

Mr. Denton: Just a moment, your Honor please. I believe regardless of what this witness may or may not have specified, if he furnished information to the Rent Director's Office and a registration was made, we have the document. Whatever the contents of those documents show, I think we are bound by them, so far as the registration is concerned. What this man may have said or may not have said is immaterial, unless it is embodied in there.

The Court: The only thing, if there were two people in there he should have registered for two people and had the rent fixed for two people.

The Witness: If you will allow me to say, I would have registered—they wouldn't let me register it. They said I had to register one. They wouldn't let me register. I told them about it. And I didn't register until then.

Q. (By Mr. Grancell): Do you know who that person was you talked to?

The Court: I do not care about that.

Q. (By Mr. Grancell): Have any of these people brought any separate action against you for the recovery of damages?

A. No, they have not.

Mr. Grancell: No further questions.

(Testimony of E. H. Hogue.)

Cross-Examination

By Mr. Denton:

Q. These papers, Reverend Hogue, which counsel for the [19] government has shown you, with the exception of the signature appearing on the bottom thereof, is the rest of this in your handwriting (indicating)? A. That is my name.

Q. I am asking, is anything else on any of these sheets other than the signature appearing down at the bottom thereof in your handwriting?

A. Nothing.

Q. Who filled these out for you?

A. I don't know who it was.

Q. Where were they filled out?

A. Over in the O.P.A. office.

Q. Someone in the O.P.A. office? A. Yes.

Q. You furnished them the information?

A. Yes.

Q. At the time they filled it out you gave them the information and someone down there wrote it out? A. Yes.

Q. Do we understand from your testimony that you said you endeavored to register these rooms for more than one occupant? Tell us what you did in making that effort.

A. I told them there was more than one and I felt like I ought to register them for more than \$5.00.

Q. We are talking about the number of people. Did you [20] tell them how many people there were there?

(Testimony of F. H. Hogue.)

A. And for the number of people in the room, because the room was for—registered. I was willing at any time when there was one person in there to rent it for \$5.00.

Q. I show you a piece of paper on which the name Elias H. Hogue appears on the bottom thereof, and at the top of this piece of paper there appears “United States of America, Office of Price Administration, Landlord Copy,” and stamped with a rubber stamp, what appears to be a rubber stamp thereon is “Received March 4, 1947, Los Angeles-Defense-Rental-Area.” I will ask you if you have ever seen that particular paper before today?

A. Yes, I have.

Q. How did you come in possession of this document which I am showing you?

A. Come by mail.

Q. Addressed to you?

A. Addressed to me.

Q. Now, in connection with the renting of the particular property involved in this case, have you at any time ever received any paper other than this from the Rental Director's Office?

A. None that I know anything about.

Mr. Denton: May we offer this, your Honor, at this time, if the Court please? [21]

Mr. Grancell: Just the document?

The Court: It will be marked in evidence.

The Clerk: Defendant's A.

(Thereupon the document above-referred to was marked Defendant's Exhibit A and was received in evidence.)

(Testimony of E. H. Hogue.)

Mr. Denton: No further questions.

Redirect Examination

By Mr. Grancell:

Q. Reverend Hogue, you say that this defendant's Exhibit A, these registrations were filled out in the Office of Price Administration by a clerk there, is that right, and you signed them?

A. I don't know whether it was a clerk or who it was. I signed them; a lady did it.

Q. A lady did it? A. Yes.

Q. Did you read those papers at the time, before you signed them?

A. I didn't have any glasses and I couldn't see it, and I didn't read them.

Q. Are you accustomed to signing things before you read them?

The Court: That is argumentative.

Mr. Denton: Objected to, your Honor; it is argumentative.

The Court: Objection sustained. [22]

Mr. Grancell: No further questions.

The Court: Step down, please.

(Witness excused.)

Mr. Grancell: Willie B. James.

WILLIE B. JAMES

a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name?

The Witness: Willie B. James.

The Clerk: Take the stand.

By Mr. Grancell:

Q. Mrs. James, will you please speak loudly, so we can all hear you? A. Yes.

Q. Did you rent a room from Reverend Hogue, the defendant in this action, on or about May 22, 1945? A. Yes, I did.

Q. What room was that?

A. It was the rear room.

Q. What address?

A. 337 East 42nd Street.

Q. To whom did you pay rent for that room?

A. To his wife and himself, Reverend Hogue and Mrs. Hogue.

Q. How much rent did you pay? [23]

A. \$10.00 a week.

Q. For how long a period of time?

A. From May 22nd up until '46 I paid \$10.00, and then he cut from \$10.00 to \$8.50.

The Court: That is May 22, 1945, until when?

The Witness: '47; this is '47.

Q. (By Mr. Grancell): Wait a minute. When you paid \$10.00 per week, that was from May 22, 1945, to what date?

(Testimony of Willie B. James.)

A. Until April the—around April the 1st in '46.

Q. Then how much rent did you pay after that?

A. He cut down to \$8.50.

Q. How long did you pay \$8.50 per week?

A. I paid from '46 up until '47.

Q. What month of 1947?

A. In '47 around April. He said he carried me through the winter months and I would have to pay the winter months.

Q. During all this period of time you have testified to, how many people occupied that room?

A. Me alone, because he told my husband he couldn't live there, and he told me he couldn't live there; and he didn't live there.

Q. Did your husband live there at any time during the period of time? A. Two months.

Q. When were those two months? [24]

A. That was directly after I moved there; we separated.

Mr. Grancell: No further questions.

Cross-Examination

By Mr. Denton:

Q. Mrs. James, how do you establish now with certainty these particular dates when you moved into the property?

A. How did I establish that?

Q. Yes. A. I am supposed to.

Q. No. Please tell us how. A. How?

Q. Yes, that is right.

A. Whenever I moved to a place I think it is proper for me to put the date down when I move

(Testimony of Willie B. James.)

in and when I move out. I think it is still proper for me to put the date down when I move out, so that anything that comes up, that I can have some kind of memorandums to know what happened.

Q. Did you do that in this case?

A. Yes, I did.

Q. When did you record the date of your first moving out to the particular room we are talking about?

A. The particular room we are talking about now, where? What address are you speaking of?

Q. We are talking about the one room you lived in at 337 East 42nd Street. [25]

A. The room I rented, the rear room, rented it first and I paid \$10.00 back there.

Q. We are not asking that. We are asking when did you first put down——

A. 22nd of May.

Q. Where did you record that?

A. I moved in that back room the 22nd of May and Christmas Eve he fixed up the front room, up in the front, and moved me up in the front room.

Q. Where did you first write down the fact that you moved in?

The Court: Counsel, I am going to cut this short. Apparently there was a reduction of rent on April 1, 1946 to \$8.50.

Mr. Denton: We will stipulate to that, your Honor.

The Court: I am only going to allow for judgment for the return of the rent for the year preceding June 5th.

(Testimony of Willie B. James.)

Mr. Denton: I won't go into that concern, your Honor, now.

Q. (By Mr. Denton): You were living in this particular room, or you were living in one room of this particular structure there during the month of June, 1946, were you? A. Yes.

Q. Who else was living with you at that time in this room? A. Nobody. [26]

Q. You were divorced or separated from your husband?

A. Yes, I was separated, but I wasn't divorced.

Q. Your husband wasn't living there with you at any time from June, 1946 up until——

A. No.

Q. ——the date you removed therefrom during this year? A. No; that is right.

Q. Did anybody else live in that room with you, other than yourself, during that period of time?

A. No.

Mr. Denton: No further questions.

Mr. Grancell: That is all.

(Witness excused.)

Mr. Grancell: Mrs. Moore.

(No response.)

Mr. Grancell: Mrs. Sadler.

ELOISE SADLER

a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name?

The Witness: Eloise Sadler.

Mr. Grancell: In view of the Court's statement, I won't go back any further. [27]

By Mr. Grancell:

Q. Did you occupy a room at 337 East 42nd Street in the City of Los Angeles between the 1st of June, 1946 and the 7th of March, 1947?

A. I did.

Q. How much rent did you pay for that room?

A. For that time I paid \$8.50.

Q. To whom did you pay the rent?

A. To Reverend Hogue.

Q. What room was that?

A. The rear room.

Q. Any number?

A. Well, it was No. 5, after they put the numbers on it?

Q. How many people occupied that room with you during that period of time?

A. Well, I have got the room for two, but my husband was in service so there was just myself.

Q. Between the 1st of June of 1946 and the 7th of March, 1947, you occupied that room alone?

A. He was in service during the first time, but he got out. I think he was there two months after-

(Testimony of Eloise Sadler.)

ward. He got out of service, I think it was in June. No, he got out of service in April in '47.

Q. April of 1947? [28] A. Yes.

Mr. Grancell: No further questions.

Cross-Examination

By Mr. Denton:

Q. When did your husband enter the service, Mrs. Sadler?

A. When did my husband enter the service?

Q. Yes.

A. Well, I wasn't even in Los Angeles when my husband entered the service.

Q. Was your husband in service on the 5th day of June, 1946?

A. Was he in service when.

Q. On the 5th day of June, 1946, was your husband in service then?

A. Yes, because he was in service then.

Q. Your husband, was he at home at any time at this particular address, other than the time he was released from service?

A. Well, not during the time I was paying \$8.50. He was there when I was paying \$10.00.

Q. We are talking about the date of June 5, 1946. A. No.

Q. Did anybody else live in that room during that time, other than yourself? A. No. [29]

Q. We are to understand, other than approximately a period of two months after your husband was discharged from the service, no one lived in there but yourself?

(Testimony of Eloise Sadler.)

A. No one lived in there but myself.

Mr. Denton: No further questions.

Mr. Grancell: That is all.

(Witness excused.)

TELA GRANT

a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name?

The Witness: Tela Grant.

By Mr. Grancell:

Q. Mrs. Grant, did you rent a room at 337 East 42nd Street, Los Angeles? A. I did.

Q. What room was that?

A. Oh, I would say it was second from the front room.

Q. It is what?

A. A certain room from the front.

Q. A certain room from the front?

A. That is as near as I could state it.

The Court: We do not care.

Q. (By Mr. Grancell): Did you rent that from the 1st of [30] June, 1946 to March 13, 1947?

Mr. Denton: I think we ought to have the testimony from the witness if she knows. Let the witness give the date.

(Testimony of Tela Grant.)

Mr. Grancell: I will withdraw that question, if your Honor please.

The Court: When did you move out of the room?

The Witness: I moved out about the last of June of '47.

The Court: The last of June of 1947?

The Witness: Yes, this last June.

Q. (By Mr. Grancell): Were you occupying it on the 1st of June, 1946?

A. I certainly was.

Q. And continuously from that time on until June, 1947? A. Until this last June.

Q. How much rent did you pay for that room.

A. At first I paid \$10.00. And from there to \$8.50.

Q. During the period from the 1st of June, 1946, to the 1st of June, 1947, how much did you pay?

A. From June, 1946, to June, 1947, \$8.50.

Q. To whom did you pay that rent?

A. Reverend Hogue.

Mr. Grancell: No further questions.

Cross-Examination

By Mr. Denton:

Q. Did anyone else live with you in the room there? [31] A. My daughter.

Q. How old was the daughter? A. 18.

Q. Did anyone else other than you and your daughter live there? A. That is all.

Q. You and your daughter occupied this par-

(Testimony of Tela Grant.)

ticular room from June, 1946 up until the time you removed therefrom, is that true? A. Yes.

Mr. Denton: No further questions.

Mr. Grancell: That is all.

(Witness excused.)

Mr. Grancell: I would like to put Mrs. James back on the witness stand for a moment.

WILLIE B. JAMES

a witness recalled by and on behalf of the Government, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Grancell:

Q. Mrs. James, were you acquainted with Mrs. Artie Mae Moore? A. Yes.

Q. Do you know which room she occupied? [32]

A. The front room.

Q. Was she in there all the time from the 1st of June, 1946 on? A. Yes.

Q. Until about what date?

A. I don't know what date, because she was there when I moved there.

Q. When you moved there?

A. When I moved to 337 East 42nd Street.

Q. When you moved in or out?

A. Moved in, she was living there.

The Court: Did she move out before you did?

(Testimony of Willie B. James.)

The Witness: Yes.

The Court: How long before?

The Witness: Oh, about three weeks.

Q. (By Mr. Grancell): You moved out on what date? A. On the 7th.

Q. Of what? A. April.

Q. Do you know how much rent Mrs. Moore paid? A. \$10.00 a week.

Q. Was that during the period that you have testified to?

A. Yes, when I first moved there.

The Court: She had her rent reduced to \$8.50, the same as the rest. Is that correct? [33]

The Witness: Yes.

Q. (By Mr. Grancell): To whom did she pay this rent, if you know?

A. To Reverend Hogue.

Q. How many people occupied that room of Artie Mae Moore's? A. One.

Mr. Grancell: No further questions.

Cross-Examination

By Mr. Denton:

Q. How do you know about the matters which you have just testified to, Mrs. James?

A. Well, because I was living right there and adjoining rooms with her. She didn't have no husband there.

Q. We are asking you how you know it.

A. How I knew it? Because—I didn't see it.

Q. You heard it?

(Testimony of Willie B. James.)

A. I didn't see it. I didn't see nobody living there with her.

Q. We are talking about how you know Artie Mae Moore moved into the property on a certain date.

A. I didn't say I know what date she moved in. I say she was living there when I moved in.

Q. You know now she moved from there some three weeks before you did? [34]

A. Yes. I was living there at the time she moved away.

Q. How do you know about the amount of rent Mrs. Moore paid Reverend Hogue?

A. She left the money with me.

Q. How many times?

A. A number of times.

The Court: Your own client testified he reduced the rent to \$8.50. He does not know the date.

Mr. Denton: There is no question about that. We have a witness here that appears to me not to be too friendly. We have a right, I believe, to inquire into the good veracity of this witness in testifying to other things. He said generally he did reduce the rent in all cases. We don't have the exact dates.

The Court: You must remember it was the duty of your client to keep records.

Mr. Denton: We realize that. It isn't incumbent on us to come in here to this Court and prove the government's case. We haven't put on any defense yet.

(Testimony of Willie B. James.)

The Court: Go ahead. I am willing to listen all afternoon.

Mr. Denton: No. I won't take any more time of the Court, but I do want to find out from this witness.

Q. (By Mr. Denton): You said you paid the rent for this Artie Mae Moore some several times?

A. Yes.

Q. How many times, about?

A. I don't know how many times; plenty of times.

Q. More than twice?

A. Yes, more than twice.

Q. Six times? A. More than twice.

Q. As many as six times?

A. I couldn't say how many times. I say it was more than twice.

Q. I am asking you was it more than six times?

The Court: You can tell if you know.

The Witness: Yes, it was more than six times.

Q. (By Mr. Denton): The fact you testified that Artie Mae Moore paid more than \$8.50 is based on the fact you paid that money to Reverend Hogue? A. That is right.

Mr. Denton: No further questions.

(Witness excused.)

Mr. Grancell: Plaintiff rests.

Mr. Denton: We will call Reverend Hogue to the stand. [36]

E. H. HOGUE

a witness recalled by and on behalf of the defendant, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Denton:

Q. Reverend Hogue, from the 5th day of June of 1946, up until the 7th day of April, 1947, as far as you personally know has anybody else lived in this room but Mrs. James, one of the witnesses who testified here this afternoon? Was anyone else living in the room with her during that period of time?

A. Mr. James lived with her. I don't say he was there every day. He lived with her just a day or two before she moved out. He was in there arguing with me that it was his money that paid the rent.

Q. During that full period of time?

A. Sure; Mr. James was there.

Q. As to Artie Mae Moore, from the 5th day of June, 1946, until the 8th day of March of 1947, as far as you personally know, did anyone else, other than Artie Mae Moore live in that particular room?

A. None but her husband, and sometimes when her husband wasn't there, sometimes, somebody else stayed there. I don't know who it was; once in a while. I know somebody else stayed there. I don't know his name. Her husband was on the road [37] and when he came in he stayed there.

(Testimony of E. H. Hogue.)

Q. You tell us now you saw some male individual there, other than her husband? A. I did.

Q. When you say he stayed there, what do you mean?

A. I guess he stayed there all night; he was there.

Q. We don't want you to guess. Tell us what you know.

A. He was there at night and he was there in the morning.

Q. Did you see him more than once?

A. Yes, I seen him more than once.

Q. As to Mrs. Eloise Sadler, from the 5th day of June, 1946, up until the 7th of March, 1947, as far as you personally know, did anyone occupy this room in your premises that was then being occupied by Mrs. Sadler, other than this particular person?

A. Nothing but her husband. She rented this room for her and her husband. He wasn't there all the time.

Q. I am asking if more than Mrs. Eloise Sadler was in that room? A. Mrs. Sadler.

Q. During the entire period I have indicated?

A. Yes.

Q. Is that right? A. Yes.

Mr. Denton: Your Honor, we already have the fact that [38] Mrs. Tela Grant's daughter lived with her there.

Q. (By Mr. Denton): Other than the registration slip that the government has introduced here and the one that has been introduced on your behalf,

(Testimony of E. H. Hogue.)

did you receive at any time any other information from the Los Angeles Rental Director as to what you were supposed to charge in the way of rent, other than those which appear in those documents in evidence? A. I did not.

Q. That is everything you received?

A. Yes.

Mr. Denton: No further questions.

The Court: You are still charging \$8.50 a week for the rent for these rooms?

The Witness: Yes.

Mr. Denton: The charges you are making, \$8.50 now, is more than one person in each room?

The Witness: Oh, yes.

Mr. Grancell: You still haven't filed an application for an increase of rent, have you?

Mr. Denton: We will stipulate none has been filed.

Mr. Grancell: No further questions.

Mr. Denton: Your Honor, would counsel want to stipulate that if we called Mrs. Hogue, the wife of the defendant here, for the purpose of proving occupancy by more than one tenant in each of these rooms, that if we called her her testimony [39] would be substantially as that given by the defendant, so far as to the number of people occupying these particular rooms in that period of time? Will counsel stipulate if Mrs. Hogue were called she would testify in the same manner as the defendant has, as to the occupants for that period of time?

(Testimony of E. H. Hogue.)

Mr. Grancell: So stipulated, your Honor.

(Witness excused.)

Mr. Denton: We have nothing more, your Honor.

The Court: I am going to direct a refund for all rents collected in excess of the \$5.00 a week after June 5, 1946, and a like amount as penalty. Also an injunction restraining him from charging more than \$5.00 a week until he gets an order from the Rent Director to charge more. Prepare findings within five days.

Mr. Grancell: Yes. You waive findings of fact and conclusions of law?

Mr. Denton: No.

Mr. Grancell: I will draw them and submit them as fast as we can get them in here.

[Endorsed]: Filed April 12, 1947.

[Endorsed]: No. 11897. United States Circuit Court of Appeals for the Ninth Circuit. Lillie T. Hogue and Elias Hogue, Appellants, vs. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed April 15, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

No. 11897

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LILLIE T. HOGUE and ELIAS HOGUE,

Appellants,

vs.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER,

Appellee.

BRIEF OF APPELLANTS.

MARSHALL DENTON, JR.,
3519 South Central Avenue, Los Angeles 11,
Counsel for Appellants.

FILED

AUG 3 - 1948



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No. 11897

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LILLIE T. HOGUE and ELIAS HOGUE,

Appellants,

vs.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER,

Appellee.

BRIEF OF APPELLANTS.

I.

Jurisdiction.

Appellee, as Housing Expediter of the United States, filed this complaint, containing two causes of action, against appellants seeking to recover treble damage for alleged overcharge of rents and to enjoin the appellants from such future violation.

Appellee claims jurisdiction in the District Court of the United States by reason of Sections 205 (c) and 205 (e) of the Emergency Price Control Act of 1942, as amended, U.S.C.A. Title 50, App. Sec. 901 *et seq.* [p. 2, Tr. of Rec.]

II.

Statement of the Case.

On June 5, 1947, Appellee hereinabove named, a Housing Expediter of the United States, filed his complaint against appellants herein in the United States District Court, Southern District of California, in the Central Division thereof. The complaint contained a first and second cause of action and prayed for judgment against appellants for treble damage for an asserted overcharge of rents by Appellants for the housing accommodations described in the said complaint, in violation of the Rent Regulations for Housing, and likewise sought a preliminary and final injunction enjoining Appellants herein, as defendants in said action, from such future violations.

In their verified Answer Appellants deny any such violation. Further, Appellants admitted receiving rents from tenants in excess of the amount fixed in the rental registration for a single occupant for the room. They justify such act by stating that in the absence of an Order of the Rent Director prescribing the amount of rent which can be collected for extra tenants in a particular room upon which a ceiling had been fixed for a single occupant thereof there could be no violation of rent ceiling.

III.

Specification of Errors.

The Court erred in finding that Appellants had received rents in excess of the maximum rents permitted under the Rent Regulation and Orders of the Rent Director and Ordering judgment for Appellee.

IV. ARGUMENT.

Summary of Argument.

Point A.

The question on this Appeal is a rent-ceiling Order of the Housing Expediter, which fixes a rent ceiling of \$5.00 per week for a room occupied by one (1) tenant, for living purpose, violated where the landlord charges and collects more than \$5.00 per week when such room is occupied by more than one (1) tenant? [Tr. of Rec. p. 23].

Appellants submit that there is no violation where the landlord charges for extra tenants in a particular room if there was no Order of the Housing Expediter, at the time of the charge, prescribing the rate for such extra tenants. Appellee takes the opposite position [Tr. of Rec. pp. 31-39].

The rooms in question had a rate of \$5.00 per week for one (1) person as registered in the Area Rent Office on March 4th, 1947 [Tr. of Rec. p. 11]. Appellee's exhibits indicate that the premises involved had previously been registered and also disclosed the services the tenants were entitled to under the rental Agreements [Tr. of Rec. pp. 12, 15].

Section 205 (e) of the Emergency Price Control Act of 1942, as amended, U.S.C.A. Title 50, App. Sec. 925, provides:

“(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other

than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs, as determined by the court, plus whichever of the following sums is greater:

(1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or

(2) An amount not less than \$25.00 nor more than \$50.00, as the Court in its discretion may determine; Provided, however, that such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purpose of this section the payment on receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "Overcharge" shall mean the amount by which consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the administrator may institute such action on behalf of the United States within such one-year period"

How can it be contended that Appellants have collected rent in excess of an Order of the Rent Director when in fact no such Order ever had been made at the time of the overcharge? The regulation was for \$5.00 per week per person for the rooms involved [Tr. of Rec. p. 11]. The record fails to disclose any registration or Order ever having been made and issued by the Rent Director for occupants in excess of one. Appellants submit that until such registration or Order there could be no violation.

It may be submitted that such a situation would constitute grounds to support an injunction to enjoin collection of rent for extra tenants until the landlord had obtained an Order from the Rent Director authorizing an increased charge of rent for extra occupants of a particular room or rooms. However, it is obvious that the right to injunctive relief does not furnish support for a judgment Ordering refund of rent collected which did not violate any Order of the Rent Director which was in existence and effect at the time such rent was collected.

Nor can it be rationally contended that there was a violation of an Order or Registration if the rent collected was for more than one (1) tenant when there existed no Order of the Rent Director specifying the amount of rent which might be charged by the landlord for extra tenants in a particular room.

Conclusion.

It is therefore respectfully submitted that this Court should reverse the decision and judgment of the United States District Court.

MARSHALL DENTON, JR.,

Counsel for Appellants.

No. 11898

United States
Circuit Court of Appeals

For the Ninth Circuit

CASCADE COUNTY, MONTANA and THE
HOME INSURANCE COMPANY, NEW
YORK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

JUL 12 1943

PAUL R. O'BRIEN,
CLERK

No. 11898

United States
Circuit Court of Appeals
For the Ninth Circuit

CASCADE COUNTY, MONTANA and THE
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for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

H. R. EICKEMEYER,
Great Falls, Montana,

LA RUE SMITH, JR.,
Great Falls, Montana,
Attorneys for Plaintiffs and Appellants.

JOHN B. TANSIL,
United States District Attorney,
Billings, Montana,

FRANKLIN A. LAMB,
Assistant United States District Attorney,
Billings, Montana,
Attorneys for Defendant and
Appellee. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the District of Montana, Great Falls
Division

No. 993

CASCADE COUNTY, MONTANA, and THE
HOME INSURANCE COMPANY, New York,
on behalf of itself and all other insurance com-
panies, similarly situated,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Be It Remembered that on July 31, 1947, a Com-
plaint was duly filed herein, in the words and figures
following, to wit: [2]

COMPLAINT

Come Now the Plaintiffs and for a Cause of
Action Complain and Allege as Follows:

I.

The jurisdiction of this court is claimed on the
ground that the plaintiff, Cascade County, is and
at all times mentioned herein was a municipal cor-
poration duly organized and existing under the
laws of the State of Montana; and that the plaintiff,
The Home Insurance Company, New York, is and
at all times mentioned herein was a private corpo-
ration duly organized and existing under the laws
of the State of New York; and that the United

States of America is the real party defendant in interest under the Federal Tort Claims Act of August 2, 1946.

II.

On August 9th, 1946, in the County of Cascade, State of Montana, United States Army Air Forces personnel, whose names are unknown to these plaintiffs, all employees and officers of the defendant, acting within the scope of their office and employment, flew three A-26 bomber type aircraft in such a reckless, careless and negligent manner that one of said aircraft crashed into, upon and against a barn, generally known and described as [3] Horse Barn "A", located on the Cascade County Fair Grounds, then and there the property of the plaintiff, Cascade County, and thereby damaged, and caused a fire which entirely destroyed said property to the damage of said plaintiff, Cascade County, in the total sum of Eighteen Thousand Six Hundred Eighty-five Dollars (\$18,685.00).

III.

The plaintiff, The Home Insurance Company, New York, brings this action on behalf of itself and all other insurance companies similarly situated which have made payment under their respective insurance policies to the plaintiff, Cascade County, on account of the damage to the above described property of said Cascade County caused by the defendant as hereinbefore alleged, and which insurance companies are subrogees of the said Cascade County to the extent of such payments. The said

subrogee insurance companies are approximately seventy-one (71) in number and it is therefore impracticable to bring them all before this court.

IV.

The plaintiff, The Home Insurance Company, New York, and all said insurance companies similarly situated on whose behalf this action is brought, are and at all times mentioned herein were corporations duly authorized under the laws of the State of Montana to issue policies of fire insurance and are and at all times herein mentioned were engaged in such business in the County of Cascade, State of Montana.

V.

In consideration of the premiums paid to it, the plaintiff, The Home Insurance Company, New York, executed and issued to the plaintiff, Cascade County, five policies of insurance, as follows:

Policy No.	Effective Dates	Face Amount
969	1 January 1942 - 1 January 1947.....	\$ 1,000.00
1013	1 January 1946 - 1 January 1951.....	4,000.00
1059	1 January 1945 - 1 January 1950.....	4,000.00
1060	1 January 1945 - 1 January 1947.....	4,000.00
9961	1 January 1945 - 1 January 1950.....	10,000.00

insuring the said Cascade County in the sum of Twenty-three Thousand Dollars (\$23,000.00) against loss or damage, by fire or aircraft, to any and all property of the said Cascade County. All the said policies of insurance being similar in their terms, except as to those matters specifically set out above, a copy of policy number 9961 is attached hereto as Exhibit "A" and by this reference made a part of this complaint as though fully set out herein.

VI.

In addition to the plaintiff, The Home Insurance Company, New York, all other insurance companies similarly situated and on whose behalf this action is brought, in consideration of the premiums paid to each respectively, did, on various dates all prior to the date of the loss and damage set out hereinabove, execute and issue to the plaintiff, Cascade County, policies of insurance of various face amounts, insuring the said Cascade County in the total sum of Seven Hundred Forty-eight Thousand Six Hundred Dollars (\$748,600.00) against loss or damage, by fire or aircraft, to any and all property owned by said Cascade County; and all of which policies were similar in terms to Exhibit "A" hereto, except as to those matters set out herein, and all of which policies were in full force and effect on the 9th day of August, 1946.

VII.

By reason of the damage and loss caused to the plaintiff, Cascade County, as set out hereinabove, the plaintiff, The Home Insurance Company, New York, and all other insurance companies similarly situated on whose behalf this action is brought, each became liable under its respective policies, or policy, of insurance to pay its proportionate share of said loss and damage, and on the 28th day of December, 1946, did pay to the said Cascade County, the total sum of Eight Thousand Five Hundred and Fifty Dollars (\$8,550.00), as follows, to-wit: [5]

Policy Number	Company	Face Value of Policy	Proportionate Share Paid
1865	Aetna Insurance Company.....	\$ 12,500	\$ 142.77
1953	Aetna Insurance Company.....	5,000	57.11
1969	Aetna Insurance Company.....	2,500	28.55
3158	Aetna Insurance Company.....	5,000	57.11
3176	Aetna Insurance Company.....	2,000	22.84
218573	Agricultural Insurance Company.....	10,000	114.21
3014	American Alliance Ins. Co.....	2,000	22.84
632856	American Alliance Ins. Co.....	18,500	211.29
M-446	American Eagle Fire Ins. Co.....	4,000	45.69
933	American Eagle Fire Ins. Co.....	4,000	45.69
1107	American Eagle Fire Ins. Co.....	5,000	57.11
58146	American & Foreign Ins. Co.....	2,500	28.55
317276	American Insurance Company.....	8,000	91.37
U400052	Anglo-American Underwriters	10,000	114.21
56976	Associated Fire & Marine Ins. Co.....	8,500	97.08
1020	Baltimore American Ins. Co.....	4,000	45.69
20132	Baltimore American Ins. Co.....	5,000	57.11
20176	Baltimore American Ins. Co.....	2,000	22.84
845839	Boston Insurance Company.....	2,000	22.84
447513	Camden Fire Ins. Association.....	2,000	22.84
458891	Camden Fire Ins. Association.....	6,000	68.53
464583	Camden Fire Ins. Association.....	5,000	57.11
239861	Capital Fire Insurance Company.....	6,000	68.53
412106	Capital Fire Insurance Company.....	2,000	22.84
208	City of New York Ins. Co.....	1,000	11.42
343	City of New York Ins. Co.....	2,000	22.84
423	City of New York Ins. Co.....	7,000	79.96
354	Columbia Fire Ins. Co. (Dayton).....	2,000	22.84
403618	Columbia Insurance Co. (N. Y.).....	7,500	85.66
544	Concordia Fire Insurance Co.....	4,000	45.69
556	Concordia Fire Insurance Co.....	5,000	57.11
557	Concordia Fire Insurance Co.....	1,000	11.42
53932	Connecticut Fire Insurance Co.....	6,000	68.53
308044	Connecticut Fire Insurance Co.....	5,000	57.11
3789	Continental Insurance Company.....	5,000	57.11
9189	Continental Insurance Company.....	4,000	45.69
10867	Continental Insurance Company.....	8,000	91.37
10886	Continental Insurance Company.....	4,000	45.69
10910	Continental Insurance Company.....	4,000	45.69
13776	Continental Insurance Company.....	20,000	228.43

Policy Number	Company	Face Value of Policy	Proportionate Share Paid
271053	Eagle Fire Co. of N. Y.....	2,500	28.55
F 352277	Eureka-Security Fire & Marine.....	2,000	22.84
1738	Fidelity & Guaranty Fire Corp.....	2,000	22.84
3364	Fidelity & Guaranty Fire Corp.....	3,000	34.26
4856	Fidelity-Phenix Fire Ins. Co.....	10,000	114.21
105	Firemen's Insurance Company.....	8,000	91.37
158	Firemen's Insurance Company.....	2,000	22.84
180	Firemen's Insurance Company.....	4,500	51.40
232	Firemen's Insurance Company.....	10,000	114.21
1539F-1747	First National Insurance Co.....	2,000	22.84
1539F-2233	First National Insurance Co.....	10,000	114.21
5813F-1156	First National Insurance Co.....	4,000	45.69
748	Franklin Fire Insurance Co.....	10,000	114.21
3008	Franklin Fire Insurance Co.....	7,000	79.96
3009	Franklin Fire Insurance Co.....	2,000	22.84
3363	Franklin Fire Insurance Co.....	7,000	79.96
9601	Granite State Fire Insurance Co.....	1,000	11.42
16811	Granite State Fire Insurance Co.....	1,000	11.42
425006	Great American Insurance Co.....	5,000	57.11
6319	Hanover Fire Insurance Co.....	7,500	85.66
8121	Hartford Fire Insurance Co.....	5,000	57.11
8342	Hartford Fire Insurance Co.....	3,800	43.40
13419	Hartford Fire Insurance Co.....	10,000	114.21
643	Hibernia Underwriters	14,500	165.61
741	Hibernia Underwriters	2,500	28.55
839	Hibernia Underwriters	2,500	28.55
988	Hibernia Underwriters	10,000	114.21
969	Home Insurance Company.....	1,000	11.42
1013	Home Insurance Company.....	4,000	45.69
1059	Home Insurance Company.....	4,000	45.69
1060	Home Insurance Company.....	4,000	45.69
9961	Home Insurance Company.....	10,000	114.21
64490	Homeland Insurance Company.....	3,000	34.26
64611	Homeland Insurance Company.....	3,000	34.26
82681	Homeland Insurance Company.....	1,000	11.42
83400	Homeland Insurance Company.....	2,000	22.84
92437	Homeland Insurance Company.....	3,000	34.26
06067	Home Underwriters Agency.....	2,400	27.41
06076	Home Underwriters Agency.....	2,400	27.41
06118	Home Underwriters Agency.....	9,000	102.79

Policy Number	Company	Face Value of Policy	Proportionate Share Paid
LS818443F	London & Lancashire Ins. Co.....	2,000	22.84
51561	Maryland Insurance Company.....	5,000	57.11
51564	Maryland Insurance Company.....	2,000	22.84
1001	Massachusetts Fire & Marine.....	6,000	68.53
513334	Mercantile Insurance Company.....	5,000	57.11
556017	Mercantile Insurance Company.....	3,000	34.26
403278	Mercury Insurance Company.....	2,000	22.84
511009	Merehants Fire Assurance Corp.....	5,000	57.11
2258	Minneapolis Fire & Marine.....	8,000	91.37
3005	Minneapolis Fire & Marine.....	3,000	34.26
25072	Minneapolis Fire & Marine.....	7,000	79.96
50353	Minneapolis Fire & Marine.....	2,000	22.84
72346	Minneapolis Fire & Marine.....	3,000	34.26
72385	Minneapolis Fire & Marine.....	2,000	22.84
73637	Minneapolis Fire & Marine.....	2,000	22.84
73672	Minneapolis Fire & Marine.....	3,000	34.26
321	National-Ben Franklin Ins. Co.....	1,000	11.42
347	National-Ben Franklin Ins. Co.....	2,000	22.84
464	National-Ben Franklin Ins. Co.....	2,000	22.84
488	National-Ben Franklin Ins. Co.....	2,000	22.84
489	National-Ben Franklin Ins. Co.....	1,000	11.42
1100	National Liberty Insurance Co.....	2,000	22.84
1131	National Liberty Insurance Co.....	2,000	22.84
321	New Brunswick Fire Insurance Co.....	13,000	148.48
282037	New Hampshire Fire Insurance Co.....	5,000	57.11
358274	New York Underwriters.....	3,000	34.26
364019	New York Underwriters.....	5,000	57.11
364048	New York Underwriters.....	1,000	11.42
815383	Niagara Fire Insurance Company.....	6,000	68.53
892841	Northern Assurance Company.....	10,000	114.21
15132	North River Underwriters Agency.....	10,000	114.21
4206161	North River Insurance Company.....	5,000	57.11
2092	Norwich Union Fire Ins. Society.....	10,000	114.21
145-7586	Northwestern Mutual Fire Ass'n.....	3,000	34.26
A168206	Occidental Insurance Company.....	7,000	79.96
105658	Old Colony Insurance Company.....	5,000	57.11
107332	Old Colony Insurance Company.....	5,000	57.11
0S835967F	Orient Insurance Company.....	1,400	15.99
0S836013F	Orient Insurance Company.....	3,400	38.83
A950309	Orient Insurance Company.....	400	4.57
A952228	Orient Insurance Company.....	1,400	15.99

Policy Number	Company	Face Value of Policy	Proportionate Share Paid
B996560	Orient Insurance Company.....	1,400	15.99
26656	Pacific Fire Insurance Co.....	3,000	34.26
26660	Pacific Fire Insurance Co.....	5,000	57.11
2800800	Pacific Fire Insurance Co.....	2,000	22.84
275530	Pennsylvania Fire Insurance Co.....	5,000	57.11
48450	Phoenix Assurance Company.....	10,000	114.21
77012	Phoenix Insurance Company.....	1,000	11.42
772177	Providence Washington Ins. Co.....	10,000	114.21
417937	Queen Insurance Company.....	4,000	45.69
444007	Queen Insurance Company.....	5,000	57.11
75411	Rocky Mountain Fire Ins. Co.....	3,000	34.26
76774	Rocky Mountain Fire Ins. Co.....	10,000	114.21
77884	Rocky Mountain Fire Ins. Co.....	10,000	114.21
78070	Rocky Mountain Fire Ins. Co.....	6,000	68.53
84236	Rocky Mountain Fire Ins. Co.....	1,000	11.42
84238	Rocky Mountain Fire Ins. Co.....	5,000	57.11
84352	Rocky Mountain Fire Ins. Co.....	3,000	34.26
84353	Rocky Mountain Fire Ins. Co.....	2,000	22.84
86841	Rocky Mountain Fire Ins. Co.....	5,000	57.11
440492	Royal Insurance Company.....	5,000	57.11
7436	St. Paul Fire & Marine Ins. Co.....	5,000	57.11
62491	St. Paul Fire & Marine Ins. Co.....	2,500	28.55
S264676	Springfield Fire & Marine Ins. Co.....	3,000	34.26
857	Twin City Fire Insurance Co.....	4,500	51.40
885	Twin City Fire Insurance Co.....	7,000	79.95
959	Twin City Fire Insurance Co.....	1,500	17.13
1041	Twin City Fire Insurance Co.....	1,500	17.13
2034	Washington Underwriters Dept.....	5,000	57.11
2064	Washington Underwriters Dept.....	1,000	11.42
853	Westchester Fire Insurance Co.....	1,000	11.42
203581	Westchester Fire Insurance Co.....	3,000	34.26
203589	Westchester Fire Insurance Co.....	7,000	79.95
A188004	Western National Insurance Co.....	4,000	45.69
A188036	Western National Insurance Co.....	2,000	22.84
A188953	Western National Insurance Co.....	4,000	45.69
A200700	Western National Insurance Co.....	7,000	79.95
A203037	Western National Insurance Co.....	2,000	22.84
01010	World Fire & Marine Ins. Co.....	5,000	57.11
01041	World Fire & Marine Ins. Co.....	3,000	34.26
		<hr/>	<hr/>
		\$748,600	\$8,550.00

VIII.

By reason of the foregoing payments, the plaintiff, The Home Insurance Company, New York, and each of the other insurance companies similarly situated on whose behalf this action is brought, became entitled to be subrogated to all the rights of the said plaintiff, Cascade County, against the United States of America, defendant, arising from the loss and damage set out in paragraph II above, to the full extent of such payments. [8]

Wherefore, the plaintiffs pray judgment against the United States of America in the sum of Eighteen Thousand Six Hundred Eighty-five Dollars (\$18,685.00) together with costs and such other and further relief as may be proper.

/s/ ROBERT WEIR,

Chairman of the Board of County Commissioners,
Cascade County, Montana.

/s/ LARRY T. DIRINGER,

Manager, The Home Insurance Company, New
York, 419-425 Ford Building, Great Falls,
Montana.

/s/ H. R. EICKEMEYER,

/s/ LA RUE SMITH, JR.,

Attorneys for the Plaintiffs.

State of Montana,
County of Cascade—ss.

Robert Weir, being duly sworn, deposes and says that he resides in Great Falls, Montana; that he is

the duly elected Chairman of the Board of County Commissioners of the County of Cascade, State of Montana; and that he has read the foregoing complaint and knows the contents thereof and verily believes the facts stated in the pleading to be true.

/s/ ROBERT WEIR.

Subscribed and sworn to before me this 30th day of July, A.D. 1947.

[Seal] /s/ H. R. EICKEMEYER,

Notary Public for the State of Montana, residing
at Great Falls, Montana.

My commission expires March 1, 1948. [10]

State of Montana,

County of Cascade—ss.

Larry T. Diringer, being duly sworn, deposes and says that he resides in Great Falls, Montana; that he is the Manager and general agent of The Home Insurance Company, New York, in and for the State of Montana; and that he has read the foregoing complaint and knows the contents thereof and verily believes the facts stated in the pleading to be true.

/s/ LARRY T. DIRINGER.

Subscribed and sworn to before me this 26th day of July, A.D. 1947.

[Seal] /s/ LA RUE SMITH, JR.,

Notary Public for the State of Montana, residing
at Great Falls, Montana.

My commission expires July 26, 1949. [11]

No. 9961

STOCK COMPANY

9801

RENEWAL OF No.

The Home Insurance Company

NEW

YORK

ORGANIZED 1853



AMOUNT ... \$ 10,000.00 RATE 2.359 PREMIUM \$ 235.90 } TOTAL
 EXTENDED COVERAGE* RATE .293 PREMIUM \$ 29.30 } PREMIUM \$ 265.20

*No insurance attaches in connection with Extended Coverage Perils unless "Rate" and "Premium" is specified above and Extended Coverage endorsement is attached to this policy.

In Consideration of the Provisions and Stipulations Herein or Added Hereto

AND OF TWO HUNDRED SIXTY FIVE AND 20/100--- DOLLARS PREMIUM
 this company, for the term } from the 1ST day of JANUARY, 19 45 } at noon, Standard Time, at
 of five years } to the 1ST day of JANUARY, 19 50 } location of property involved,

to an amount not exceeding TEN THOUSAND AND NO/100 Dollars,

does insure COUNTY OF CASCADE, STATE OF MONTANA

and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In witness whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at

GREAT FALLS, MONT. 3801-72

W. B. ...
 "Secretary

J. B. ...
 President

Countersigned
 this 26th day of December 19 44

FRARY & MULLING, INC. Agent.

BY: B. B. ...

1 Concealment, This entire policy shall be void if, whether
2 fraud, before or after a loss, the insured has will-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance or the
5 subject thereof, or the interest of the insured therein, or in case
6 of any fraud or false swearing by the insured relating thereto.
7 Uninsurable This policy shall not cover accounts, bills,
8 and currency, deeds, evidences of debt, money or
9 accepted property, securities; nor, unless specifically named
10 hereon in writing, bullion or manuscripts.
11 Perils not This Company shall not be liable for loss by
12 included, fire or other perils insured against in this
13 policy caused, directly or indirectly, by: (a)
14 enemy attack by armed forces, including action taken by mili-
15 tary, naval or air forces in resisting an actual or an immediately
16 impending enemy attack, (b) invasion, (c) insurrection; (d)
17 rebellion, (e) revolution, (f) civil war, (g) usurped power; (h)
18 order of any civil authority except acts of destruction at the time
19 of and for the purpose of preventing the spread of fire, provided
20 that such fire did not originate from any of the perils excluded
21 by this policy, (i) neglect of the insured to use all reasonable
22 means to save and preserve the property at and after a loss, or
23 when the property is endangered by fire in neighboring prem-
24 ises; (j) nor shall this Company be liable for loss by theft.
25 Other Insurance. Other insurance may be prohibited or the
26 amount of insurance may be limited by en-
27 dorsement attached hereto.
28 Conditions suspending or restricting insurance. Unless other-
29 wise provided in writing added hereto this Company shall not
30 be liable for loss occurring
31 (a) while the hazard is increased by any means within the con-
32 trol or knowledge of the insured; or
33 (b) while a described building, whether intended for occupancy
34 by owner or tenant, is vacant or unoccupied beyond a period of
35 sixty consecutive days, or
36 (c) as a result of explosion or riot, unless fire ensue, and in
37 that event for loss by fire only.
38 Other perils Any other peril to be insured against or sub-
39 ject of insurance to be covered in this policy
40 shall be by endorsement in writing hereon or
41 added hereto.
42 Added provisions. The extent of the application of insurance
43 under this policy and of the contribution to
44 be made by this Company in case of loss, and any other pro-
45 vision or agreement not inconsistent with the provisions of this
46 policy, may be provided for in writing added hereto, but no pro-
47 vision may be waived except such as by the terms of this policy
48 is subject to change.
49 Waiver No permission affecting this insurance shall
50 exist, or waiver of any provision be valid,
51 unless granted herein or expressed in writing
52 added hereto. No provision, stipulation or forfeiture shall be
53 held to be waived by any requirement or proceeding on the part
54 of this Company relating to appraisal or to any examination
55 provided for herein.
56 Cancellation This policy shall be cancelled at any time
57 of policy, at the request of the insured, in which case
58 this Company shall, upon demand and sur-
59 render of this policy, refund the excess of paid premium above
60 the customary short rates for the expired time. This pol-
61 icy may be cancelled at any time by this Company by giving
62 to the insured a five days' written notice of cancellation with
63 or without tender of the excess of paid premium above the pro-
64 rata premium for the expired time, which excess, if not ten-
65 dered, shall be refunded on demand. Notice of cancellation shall
66 state that said excess premium (if not tendered) will be re-
67 funded on demand.
68 Mortgage If loss hereunder is made payable, in whole
69 interests and or in part, to a designated mortgagee not
70 obligations named herein as the insured, such interest in
71 this policy may be cancelled by giving to such
72 mortgagee a ten days' written notice of can-
73 cellation.
74 If the insured fails to render proof of loss such mortgagee, upon
75 notice, shall render proof of loss in the form herein specified
76 within sixty (60) days thereafter and shall be subject to the pro-
77 visions hereof relating to appraisal and time of payment and of
78 bringing suit. If this Company shall claim that no liability ex-
79 ists as to the mortgagee or owner, it shall, to the extent of pay-
80 ment of loss to the mortgagee, be subrogated to all the mort-
81 gagee's rights of recovery, but without impairing mortgagee's
82 right to sue; or it may pay off the mortgage debt and require
83 an assignment thereof and of the mortgage. Other provisions

84 relating to the interests and obligations of such mortgagee may
85 be added hereto by endorsement in writing.
86 Pro rata liability. This Company shall not be liable for a greater
87 proportion of any loss than the amount
88 hereby insured shall bear to the whole insurance covering the
89 property against the peril involved, whether collectible or not.
90 Requirements in The insured shall give immediate written
91 case loss occurs, notice to this Company of any loss, protect
92 the property from further damage, forthwith
93 separate the damaged and undamaged personal property, put
94 it in the best possible order, furnish a complete inventory of
95 the destroyed, damaged and undamaged property, showing in
96 detail quantities, costs, actual cash value and amount of loss
97 claimed; and within sixty days after the loss, unless such time
98 is extended in writing by this Company, the insured shall render
99 to this Company a proof of loss, signed and sworn to by the
100 insured, stating the knowledge and belief of the insured as to
101 the following: the time and origin of the loss, the interest of the
102 insured and of all others in the property, the actual cash value of
103 each item thereof and the amount of loss thereto, all encum-
104 brances thereon, all other contracts of insurance, whether valid
105 or not, covering any of said property, any changes in the title,
106 use, occupation, location, possession or exposures of said prop-
107 erty since the issuing of this policy, by whom and for what
108 purpose any building herein described and the several parts
109 thereof were occupied at the time of loss and whether or not it
110 then stood on leased ground, and shall furnish a copy of all the
111 descriptions and schedules in all policies and, if required, verified
112 plans and specifications of any building, fixtures or machinery
113 destroyed or damaged. The insured, as often as may be reason-
114 ably required, shall exhibit to any person designated by this
115 Company all that remains of any property herein described, and
116 submit to examination under oath by any person named by this
117 Company, and subscribe the same; and, as often as may be
118 reasonably required, shall produce for examination all books of
119 account, bills, invoices and other vouchers, or certified copies
120 thereof if originals be lost, at such reasonable time and place as
121 may be designated by this Company or its representative, and
122 shall permit extracts and copies thereof to be made.
123 Appraisal. In case the insured and this Company shall
124 fail to agree as to the actual cash value or
125 the amount of loss, then, on the written demand of either, each
126 shall select a competent and disinterested appraiser and notify
127 the other of the appraiser selected within twenty days of such
128 demand. The appraisers shall first select a competent and dis-
129 interested umpire, and failing for fifteen days to agree upon
130 such umpire, then, on request of the insured or this Company,
131 such umpire shall be selected by a judge of a court of record in
132 the state in which the property covered is located. The ap-
133 praisers shall then appraise the loss, stating separately actual
134 cash value and loss to each item; and, failing to agree, shall
135 submit their differences, only, to the umpire. An award in writ-
136 ing, so itemized, of any two when filed with this Company shall
137 determine the amount of actual cash value and loss. Each
138 appraiser shall be paid by the party selecting him and the ex-
139 penses of appraisal and umpire shall be paid by the parties
140 equally.
141 Company's It shall be optional with this Company to
142 options, take all, or any part, of the property at the
143 agreed or appraised value, and also to re-
144 pair, rebuild or replace the property destroyed or damaged with
145 other of like kind and quality within a reasonable time, on giv-
146 ing notice of its intention so to do within thirty days after the
147 receipt of the proof of loss herein required.
148 Abandonment. There can be no abandonment to this Com-
149 pany of any property.
150 When loss The amount of loss for which this Company
151 payable, may be liable shall be payable sixty days
152 after proof of loss, as herein provided, is
153 received by this Company and ascertainment of the loss is made
154 either by agreement between the insured and this Company ex-
155 pressed in writing or by the filing with this Company of an
156 award as hereto provided.
157 Suit. No suit or action on this policy for the recov-
158 ery of any claim shall be sustainable in any
159 court of law or equity unless all the requirements of this policy
160 shall have been complied with, and unless commenced within
161 twelve months next after inception of the loss.
162 Subrogation. This Company may require from the insured
163 an assignment of all right of recovery against
164 any party for loss to the extent that payment thereof is made
165 by this Company.

EXTENDED COVERAGE ENDORSEMENT

PERILS OF WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOION, AIRCRAFT VEHICLES, SMOKE, EXCEPT AS HEREINAFTER PROVIDED;

for extended coverage 293

In consideration of \$ 27.30 premium, and subject to provisions and stipulations therein after referred to as "provisions") herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOION, AIRCRAFT, VEHICLES, AND SMOKE.

This endorsement does not increase the amount or amounts of insurance provided in the policy to which it is attached

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately.

Substitution of Terms: In the application of the provisions of this policy, including riders and endorsements (but not this endorsement), to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

Fall of Building Clause: The Fall of Building Clause, if any, in the policy to which this endorsement is attached shall not apply when the fall is caused by any of the perils included in this endorsement.

Apportionment Clause: This Company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, whether valid or not and whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; (2) nor for a greater proportion than the amount of insurance under this policy bears to the amount of all insurance, whether valid or not and whether collectible or not, covering in any manner such loss; furthermore, if there be insurance other than fire insurance covering any one or more of the perils causing loss hereunder, covering specifically any individual unit of property involved in the loss, only such proportion of the insurance under this policy shall apply to such unit specifically insured, as the value of such unit shall bear to the total value of all the property covered under this policy, whether such other insurance contains a similar clause or not

Glass Clause: It is expressly stipulated as applicable to all perils included in this endorsement that only such proportion of the insurance under this policy on any building covers on plate, stained, leaded or cathedral glass therein as the value of such glass which is damaged bears to the total value of said building.

War Risk Exclusion Clause: This Company shall not be liable for loss by any of the perils insured against in this endorsement caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power

Waiver of Policy Provisions: A claim for loss from perils included in this endorsement shall not be barred because building is not on ground owned by the insured in fee simple, factory operations have ceased, of change of occupancy, of existence of encumbrance, of factory operations at night, nor because of vacancy or unoccupancy.

Attached to and forming part of Policy No. 7961

Re: Insurance Company

Grand Falls, Montana

Name of Insurance Company

located at its

Agency. Dated

Jan. 1, 1945



FLURY & BOWLIN, INC.

BY:

Agent

308 JULY 1944

THE PROVISIONS PRINTED ON THE BACK OF THIS FORM ARE HEREBY REFERRED TO AND MADE A PART HEREOF

NOTATION: WHEN THIS ENDORSEMENT IS ATTACHED TO ONE FIRE POLICY THE INSURED SHOULD SECURE LIKE COVERAGE ON ALL FIRE POLICIES COVERING THE SAME PROPERTY

Exhibit "A" - Page 2

PROVISIONS REFERRED TO IN AND MADE PART OF THIS FORM (No. 202)

Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snowstorm, tidal wave, high water or overflow whether driven by wind or not.

This Company shall not be liable for loss to the interior of the building or the insured property therein caused (a) by rain, snow, sand or dust, whether driven by wind or not, unless the building insured or containing the property insured shall first sustain an actual loss to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the insured property therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is assumed in the form attached to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property: (a) grain, hay, straw or other crops outside of buildings or (b) windmills, windpumps or their towers, cloth awnings, signs, metal smokestacks, temporary or board roof additions, or (c) buildings (or their contents) in process of construction or reconstruction unless entirely enclosed and under roof with all outside doors and windows permanently in place.

Provisions Applicable Only to Explosion: This Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels, located in the building(s) insured or in building(s) containing the property insured.

Any other explosion clause made a part of this policy is superseded by this endorsement.

Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotion: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. This Company shall not be liable, however, for loss resulting from damage to or destruction of the described property owing to change in temperature or interruption of operations resulting from riot or strike or occupancy by striking employees or civil commotion, whether or not such loss, due to change in temperature or interruption of operations, is covered by this policy as to other perils.

Provisions Applicable Only to Loss by Aircraft and Vehicles: Loss by "aircraft" includes direct loss by objects falling therefrom. The term "vehicles," as used in this endorsement, means vehicles running on land or tracks. This Company shall not be liable, however, for loss (a) by any vehicle owned or operated by the insured or by any tenant of the described premises; (b) to aircraft or vehicles including contents other than loads of aircraft or vehicles in process of manufacture or for sale; (c) to fences, driveways, sidewalks or lawns.

Provisions Applicable to Smoke: The term "smoke" as used in this endorsement means only smoke due to a sudden, unusual and faulty operation of any heating or cooking unit, only when such unit is connected to chimney by a smoke pipe, and while in or on the premises described in this policy, excluding, however, smoke from fireplaces or industrial apparatus.

Provisions Applicable Only when this Endorsement is attached to a Policy Covering Business Interruption (Use and Occupancy), Extra Expense, Rents, Leasehold Interest or Profits and Commissions: When this endorsement is attached to a policy covering Business Interruption (Use and Occupancy), Extra Expense, Rents, Leasehold Interest, Profits and Commissions, the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, resulting from direct loss to described property from perils insured against; and, while the business of the owner or tenant(s) of the described building(s) is interrupted by a strike at the described location, this Company shall not be liable for any loss owing to interference by any person(s) with rebuilding, repairing or replacing the property damaged or destroyed or with the resumption or continuation of business.

"COUNTY OF CASCADE, STATE OF MONTANA"

As is now or may hereafter be constituted.
For Account of Whom It May Concern.

Loss, if any, to be adjusted with and payable to Board of County Commissioners, Cascade County, Montana
\$ 10,000.00

On all property of every kind and description now existing or hereafter acquired, including such property on which by the printed conditions of this policy liability must be specifically assumed (Excepting such property as hereinafter specifically excluded) all while situate in, on, or attached to the premises owned and/or occupied by the insured at the following locations:

- 1 Court House Premises—Block Bounded by 2nd Avenue North, North 4th Street, 3rd Avenue North and North 5th Street.
- 2 County Jail Premises—Southwest Corner 3rd Avenue North and North 4th Street
- 3 County Shops Premises—Block Bounded by 5th Avenue North, North 5th Street, 9th Avenue North and North 9th Street
- 4 County Shops Premises, New—3rd Street Northwest, Blocks 1006 and 1007.
- 5 Fair Grounds, Premises—Blocks Bounded by 1st Avenue, N. W., 3rd Street N. W., City Limits and 9th Street N. W.
- 6 Old Peoples Home, Youths Home, Library (Nursery) and Hospital—Block 504 10th Alley South.
- 7 Civic Center Bldg (Furniture)—Blocks 433 and 434 All above in Great Falls, Montana.
- 8 Outside Jail Premises—Stockett, Sand Conlee and Bolt
- 9 Machine Shed—No 45 W/S Anaconda Road, Belt, Montana

In Cascade County, Montana

"EXTENSION CLAUSE": This insurance is extended to cover property as described and all materials, supplies and equipment to be used for repairing, making alterations and additions to the property insured hereunder while on and/or under sidewalks, platforms, alleyways and/or open spaces, provided such property be located within fifty (50) feet of said premises, and in or on cars and/or vehicles within three hundred (300) feet of said premises.

"TRUST AND COMMISSIONER'S CLAUSE": This insurance shall also apply to and cover property of others for which the insured may be legally liable or for which liability is at any time assumed by the insured, and shall also apply to and cover the insured's interest in property owned in whole or in part by others, including all material, labor and charges furnished, performed or incurred by the insured or at the expense of the insured in connection with the property on which loss is sustained. PROVIDED HOWEVER, that if such property, material, labor and/or charges be covered by more specific insurance, then insurance under this policy shall attach and cover only after the liability of such more specific insurance has been exhausted and shall then cover such and only such loss or damage as may exceed the amount due from such more specific insurance.

"GENERAL EXCLUSIONS": It is hereby understood and agreed that the following are not covered by this policy and are therefore not to be included in the application of the average and distribution clauses: (1) Excavations (digging and filling); (2) Masonry foundations, piers and retaining walls below the level of the lowest basement floor or where there is no basement, which are below the level of the ground; (3) Piping, wiring, tanks and equipment water, gas, steam, oil, etc.; (4) Architects fees; (5) Paving, curbing, side walks, driveways, lawns, gardens, trees and shrubs; (6) Merchandise held for sale; (7) Land values; (8) Motor vehicle, and trucks, makers, steam shovels, ditch diggers and other similar slow moving equipment; (9) Records consisting of Judicial, Tax, Title, Vital Statistics and other similar documents and records constituting the Public Records of the County of Cascade State of Montana, Accounts, Bills, Currency, Deeds, Evidences of Deeds, Money, Notes or Securities.

"AVERAGE CLAUSE": It is expressly stipulated and made a condition of this contract, that in event of loss, the insured shall be liable for no greater proportion thereof than the amount of the actual value of the property described herein at the time of the loss, to the total insurable interest in the property.

"DISTRIBUTION CLAUSE": It is hereby agreed that at all times this policy shall attach on each building and/or structure on content; if each building and/or structure, on contents of each yard in the proportion that the value of each building and/or structure, of the contents of each such building and/or structure, of contents in each yard bears the aggregate value of all such buildings, structures and contents to the total insurable interest in the property.

"WATCHMAN WITH APPROVED RECORDING SYSTEM, OR WATCHDOG, OR BELL RINGING SYSTEM, OR CHUCK WARRANTY, NIGHTS ONLY": (Applying to Fair Grounds Premises only) Warranted by the insured that due diligence will at all times be used by the insured to maintain one or more watchmen (with approved recording system or watch clock) who shall keep a continuous watch in and about the within described premises during the entire night, whether the premises herein described be open for business or shut down or not in operation. A breach of this warranty suspends this insurance during such breach.

"BREACH OF WARRANTY OR CONDITION CLAUSE": If a breach of any warranty or condition contained in any rider attached to this policy shall occur, which breach by the terms of said warranty or condition, shall operate to suspend or avoid this insurance, it is agreed that such suspension or avoidance due to such breach shall be effective only during the continuance of such breach and then only to the building or division or contents therein or other separate location to which such warranty or condition has reference and in respect of which such breach occurs.

"PERMITS": Permission is hereby specifically granted: (1) For existing and increased hazards and to make such changes in the use and occupancy of the premises as may be desired; (2) To be and remain vacant and/or unoccupied and to shut down and/or cease operations without limit of time; (3) For by any loss the insured may, without prejudice to this insurance, release any person, corporation, or others from liability for loss or damage caused by act or neglect of themselves or their employees or representatives. The provisions of this paragraph shall supersede and abrogate any prohibition thereof contained in the printed conditions of this policy.

"SPECIAL AGREEMENTS": This insurance shall not be prejudiced by reason of any of the following conditions: (1) If notice of sale be given in regard to any property insured hereunder; (2) If any contract of sale thereof be executed; (3) If any error or omission in regard to the name and title or the description and location of buildings insured hereunder; (4) Any error or neglect of the owner of the building insured hereunder is not the owner or of any occupant of the within described premises other than the insured, when such act or neglect is not within the control of the insured, named herein. The provisions of this paragraph shall supersede and abrogate any prohibition thereof contained in the printed conditions of this policy.

"AUTOMATIC REINSTATEMENT OF LOSSES": It is a condition of this insurance that in the event of any loss payment under this policy not exceeding one hundred dollars (\$100.00) the amount of insurance under this policy shall not be reduced.

"ELECTRICAL APPARATUS CLAUSE": If electrical appliances or devices of any kind, including wiring, are covered under this policy, this company shall not be liable for any electrical injury or disturbance to the said electrical appliances, devices or wiring caused by artificially generated electrical currents, unless fire ensues, but if fire does ensue, then in consideration of the rate of premium at which this policy is written, this company shall be liable for its proportion of loss caused by such ensuing fire.

"ACCUMULATIVE LOSS CLAUSE": In the event of loss, which in the aggregate does not exceed \$1,000.00, the insured may, after giving due notice of loss to this Company as provided by the policy, immediately make all necessary repairs. The insured will not be required to furnish proof of loss until the aggregate amount of such loss or losses exceeds the sum of \$1,000.00 provided that the insured shall execute and furnish proof of loss for the accumulated losses at the end of each policy year.

Attached to Policy No. 9961 of the No. Insurance Company

Agency at Great Falls, Montana Dated Jan. 1, 1945

[Endorsed]: Filed July 31, 1947.

FRANK & SON, INC., LIC. Agent
BY:

Thereafter, on October 14, 1947, Motion to Dismiss and Notice of Hearing Motion to Dismiss were duly filed herein, in the words and figures following, to-wit: [16]

[Title of District Court and Cause.]

MOTION TO DISMISS THE HOME INSURANCE COMPANY, BOTH INDIVIDUALLY AND IN ITS REPRESENTATIVE CAPACITY, AS A PARTY PLAINTIFF

Comes Now the defendant, United States of America, by and through John B. Tansil, United States Attorney, and Franklin A. Lamb, Assistant United States Attorney, in and for the District of Montana, and respectfully moves this Court for an order dismissing The Home Insurance Company, both individually and in its representative capacity, as a party plaintiff, upon the following grounds and for the following reasons:

I.

That the Federal Tort Claims Act of August 2, 1946, does not provide a remedy for a claim based upon the subrogation rights and prohibits the prosecution of such a claim by a subrogee.

II.

That this action and the alleged cause of action of this plaintiff is in conflict with and prohibited

by the provisions of the Assignment of Claims Act (31 U.S.C. 203).

Dated this 13th day of October, 1947.

JOHN B. TANSIL,

Attorney for the United States, in and for the
District of Montana.

FRANKLIN A. LAMB,

Assistant Attorney for the United States, in and
for the District of Montana. [17]

NOTICE OF MOTION

To Cascade County, Montana, and The Home Insurance Company, New York, plaintiffs, and H. R. Eickemeyer and La Rue Smith, Jr., Attorneys at Law, Ford Building, Great Falls, Montana, Notice:

You, and each of you, will please take notice that the undersigned will bring the above motion on for hearing before the above-entitled Court in the courtroom of the United States District Court in and for the District of Montana, at Great Falls, Montana, on the first day of the next regular term of said Court, or as soon thereafter as counsel may be heard.

JOHN B. TANSIL,

Attorney of the United States, in and for the
District of Montana.

FRANKLIN A. LAMB,

Assistant Attorney of the United States, in and
for the District of Montana.

[Endorsed]: Filed Oct. 14, 1947. [18]

Thereafter, on February 25, 1948, Decision and Order Dismissing Action of The Home Insurance Company was duly filed, entered and noted in the Civil Docket, being in the words and figures following, to-wit: [19]

In the District Court of the United States, District
of Montana, Great Falls Division

No. 993

CASCADE COUNTY, MONTANA, and THE
HOME INSURANCE COMPANY, New York,
on Behalf of Itself and All Other Insurance
Companies, Similarly Situated,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

DECISION AND ORDER

The action is commenced under the provisions of the Federal Tort Claims Act, 28 U.S.C.A. 931. Plaintiffs allege that on August 9, 1946, in Cascade County, Montana, certain employees and officers of the United States, constituting the personnel of the United States Army Air Forces, flew three A-26 bomber type aircraft in such a negligent manner that one of them crashed into a barn, the property of the County, located on the Cascade County fair-grounds, and caused a fire which entirely destroyed the property of the County, to its damage in the

sum of \$18,685.00; that prior to the loss plaintiff County had insured all of its property, including the barn, with the plaintiff Home Insurance Company and seventy-one other insurance companies; that after the fire the insurance companies paid to the County \$8,550.00 by reason of the loss, the amount being prorated among the various insurance companies, and alleges that by reason of the payments made to the County under the insurance policies, each of them are subrogated to the rights of the plaintiff County against the United States because of the loss and damage to the property of the County, and as such subrogees sue, the Home Insurance Company suing on behalf of itself and the other seventy-one insurance companies similarly situated. The defendant moves to dismiss as [20] to the plaintiff Home Insurance Company, both in its individual and representative capacity, upon the grounds (a) that the Federal Tort Claims Act does not provide a remedy for a claim based upon the subrogation rights and prohibits the prosecution of such a claim by a subrogee, and (b) that this action is in conflict with and prohibited by the provisions of the Assignment of Claims Act, 31 U.S.C. 203.

The act under which the action is brought provides: “* * * the United States District Court for the district wherein the plaintiff is a resident, or wherein the act or omission complained of occurred * * * sitting without a jury, shall have jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only,

accruing on and after January 1, 1945, on account of damage to or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury * * * in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, * * *."

In passing this act on August 2, 1946, Congress caused a radical change in the law to be made insofar as recovery might be had against the United States by reason of loss or damage caused by the negligence of an officer and employee of the United States. Prior to this act, the only relief in such cases was by either a private relief bill passed by Congress in individual cases, or by an act of Congress consenting that the United States might be sued in the particular case in a particular United States District Court and usually limiting the amount for which judgment [21] could be entered against the United States in the event the plaintiff in the action were successful. The Congress no doubt was fully conversant, in considering and passing the act, that it would thereby open up a vast field of litigation against the United States, and potentially greatly increase the expense of the Gov-

ernment in the payment of judgments which reasonably could be expected to be rendered against the United States in such actions. Therefore, it must be presumed Congress chose the language it employed in the act carefully, and with the purpose and intent of expressing exactly under what circumstances the United States would give its consent to be sued, and by whom the United States gave its consent to be sued. As the statute is a consent to be sued statute on behalf of the United States, in considering the questions presented by the motion, it must be borne in mind that the United States can only be sued by its own consent, *U. S. v. Sherwood*, 312 U. S. 584; that the consent can be manifest only by the Congress of the United States, *U. S. v. Shaw*, 309 U. S. 495; Congress has the right to prescribe the terms and conditions upon which the United States may be sued, *Minnesota v. U. S.*, 305 U. S. 382; that the suit may not be maintained against the United States if not clearly within the statute of consent and the statutes granting the right to sue the United States will be strictly construed, *U. S. v. Sherwood*, *supra*. "The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a Court enlarge its liability to suit beyond what the language requires." *Eastern Transportation Co. v. U. S. et al.*, 272 U. S. 675.

In *Caledonia Insurance Company v. Northern Pacific Railway Company*, 32 Mont. 46, 79 Pac. 544, the Supreme Court of Montana said: "If insured buildings or other property are destroyed through

the fault or negligence of some person other than the owner, the insurance company, upon payment of the loss, will be [22] subrogated to the right of the owner to recover from the wrongdoer. * * * The rights of the insurer against the wrongdoer can be no greater than those of the insured, and its recovery will be limited to the amount which it has paid on the loss." See also *Gaugler et al. v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79.

It does not follow that because the Insurance Company becomes the owner of the insured's cause of action to the extent of the payment made by it to the insured and thus may sue the original tortfeasor, that it may sue the United States as the tortfeasor, for irrespective of the laws of the State of Montana granting the cause of action no suit may be maintained upon it against the United States unless the United States has consented to be sued. The Insurance Company claims that the consent is granted by the statute under its express terms, where it is provided that the United States may be sued "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred * * * to the same claimants, in the same manner and to the same extent as a private individual under like circumstances * * *." (Underscoring mine.) The contention cannot be sustained when the act in its entirety is considered. The consent to be sued granted by

the United States is on account of damage or loss to property caused by negligence of the employees of the United States. By its consent it creates a cause of action that did not exist before. A cause of action is granted to the owner of the property because of his ownership of the property. It accrues in its entirety immediately upon the damage or loss of the property and by reason thereof, and the damage is that sustained by the owner of the property, here Cascade County. The measure of the damage is the value of the property damaged or destroyed. No loss was sustained by the Insurance Company because of the negligent destruction of the property. If the Insurance Company sustained a loss, it was because [23] of the contract entered into between itself and the owner of the property, and no right of action of any kind under the State law accrued to the Insurance Company until it made a payment under its contract to the insured. The recovery sought to be made by the Insurance Company is not for the damage to or loss of the property itself, or the amount thereof, but for the moneys paid out by it to the owner of the property under its contract with him, and its measure of claimed recovery is not the amount of the damage is that sustained by the owner of the but the amount of money it paid, even though the loss to the owner of the building, recoverable by him, is in a far greater amount. No right of action is granted by the statute to the Insurance Company at all. Any right of action that it has under the State law it derives from the owner of the property

as a result of its contract with him and the payment made and is a portion of the right of action granted to the owner of the property by Congress, which the Insurance Company seeks to prosecute in its own name. The Insurance Company contends that by the use of the words claimant and claimants it is embraced within the statute as one of a class that Congress has consented may sue. The language is not an enlargement of the language preceding it, but a limitation upon it and limits the consent to be sued by the owner only under circumstances where the owner might sue a private person under the law of the State and the liability of the United States to the owner is exactly the same, no greater or no less, as the liability of private individuals under the same circumstances, except that if private individuals under the same circumstances, under the law of the State, would be liable for interest prior to judgment or punitive damages, the United States is not liable. In construing Section 203, Title 31, U.S.C.A., the Assignment of Claims Act against the United States, the Supreme Court said in *National Bank of Commerce v. Downie*, 218 U. S. 353: "It" (the statute) "strikes at every derivative interest in whatever form acquired, [24] and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." (Emphasis the Court.) It thus appears that Congress, in using the words claimant and claimants in the statute referred to and meant the original owner of the claim and not one who derives

all or a part of the claim from the original owner. The Insurance Company contends that by Section 943, Title 28, exempting specific claims from the operation of the act, Congress manifested its intent that all other claims mentioned therein were within the act, including claims by subrogees under the maxim *expressio unius est exclusio alterius*, citing *Johnson v. Southern Pacific Company*, 117 Fed. 462. The section does not permit the application of the maxim. Had the section provided that certain claimants could not sue if their loss or damage was caused in the manner set out in any one of the twelve subdivisions of the section, the application of the maxim might be argued, but the section does not so provide. The section specifically provides that consent is not granted for anyone to sue the United States, i.e., become a claimant if the loss or damage is caused by any of the acts of the government employees set out in the twelve subdivisions of the section. It is all inclusive and prevents anyone from suing. The section is one of restriction upon the consent granted by Section 931 and not one of enlargement.

It is urged by the defendant that to permit the action to be maintained by the Insurance Company would violate Section 203, Title 31, U. S. C. A., which provides where material: "Assignments of claims void. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney,

orders, or other authorities for receiving payment of any claim upon the United States, or of any except as provided in section 204 of this title, shall be absolutely null and void, unless they are freely made and executed in the presence of at least [25] two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

One of the policies of insurance is attached to the complaint as an exhibit and it is said that all of them sued on are similar as to form, and as a part of the policy it is provided: "Subrogation. This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this company."

Thus the policy, by its terms, provides for a subrogation through the voluntary assignment of the claimant of his cause of action to the insurance company. If this provision of the contract is carried out as between the parties and the assignment made, unquestionably it would violate the provisions of the statute. Should the insured, after receiving payment under the contract of insurance, refuse to make the formal assignments, under the doctrine that equity considers that done that ought to be done, the insurer would still be subrogated, which would still result in a violation of the statute, for as said by the Supreme Court in *National Bank of Commerce v. Downie, Trustee*, 218 U. S. 345. in considering the statute and its terms: "It would seem to be impossible to use

language more comprehensive than this. It embraces alike legal and equitable assignments."

The Insurance Company does not press its right under the contract, but relies upon the law of the State and the decision of the Supreme Court of the State in *Caledonia Insurance Company v. Northern Pacific Railway Company*, supra, wherein the Supreme Court, in holding an insurer subrogated to the right of the insured upon making payment, in part said: "The next inquiry is, was such cause of action assignable? For subrogation is merely an equitable assignment or an assignment by operation of law." The result arrived at by the Supreme Court of the State was through the construction of Section 1351 of the Civil Code of 1895, now Section [26] 6805, Revised Codes of Montana, 1935, which provides: "Transfer and survivorship. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office."

In *State ex rel Stiefel v. District Court of the Ninth Judicial District*, 96 Pac. 337, the Supreme Court of Montana held that under this section an assignment may be made without writing, and if the assignment is, as the State Supreme Court says, merely an equitable assignment or an assignment by operation of law, it is clear that the law is put

into operation by the voluntary act of the insured in accepting payment from the insurer, the payment not only operating as a performance on the part of the insurer to the insured under its contract, but also as a purchase of the cause of action the insured might have had against another directly responsible for the loss of the property insured, to the extent of the payment made by the insurer. The Insurance Company relies upon the decisions of the Supreme Court holding that a debt due from the United States to a decedent may be paid to an administrator, *Wyman v. U. S.*, 109 U. S. 654; a debt due from the United States to a minor child may be paid to a guardian, *Taylor v. Bemiss*, 110 U. S. 42. These cases are not in point as under those circumstances there is no assignment made of the claim. Neither is it an assignment of the claim if the proceeds of the claim are paid to a proper custodian in insolvency or bankruptcy proceedings pending in a competent court for the purpose of paying the debts of the claimant, *Butler v. Goreley*, 146 U. S. 303, *Price v. Forrest*, 173 U. S. 410. The Insurance Company relies upon general language of the Supreme Court to the effect that the Section does not embrace cases where there has been a transfer of title by operation of law, *Western Pacific Company v. U. S.*, 268 U. S. 271. The language of the Supreme Court is general, but the language of any [27] Court, in its opinion, must be read in the light of the facts of the particular case before the Court and to which all of its language is considered addressed. The

facts in that case were that the plaintiff in the action, Western Pacific Company, was the successor in interest of the Western Pacific Railway. Receivers of the property of the said Western Pacific Railway had been appointed in a federal district court in California in a suit brought against it there and the sale was made of the claim by the receivers in said suit pursuant to an order of the court to the plaintiff Western Pacific Company. The operation of law there, under which title passed, was purely involuntary as far as the owner of the claim was concerned. It cannot be presumed that by the use of the language the Supreme Court laid down the general rule that all assignments by operation of law are not within the statute. Certainly it cannot be contended that where using the language in any case the Court had in mind an assignment of an action in tort against the United States, as there was no such action in anyone prior to the passage of the Federal Tort Claims act. The Supreme Court has made its meaning clear as to that language in *United States v. Gillis*, 95 U. S. 407, where it says, in considering the statute: “ ‘There are devolutions of title by force of law, without any act of parties, or involuntary assignments, compelled by law’ to which this statute did not apply.” The sale of the property by the receivers appointed by the Court in the action against the Railway Company is an illustration of a devolution of title by force of law without any act of the parties and if it is said that it results in an assignment it is an involuntary assignment compelled by

law, but here any title the Insurance Company may have to any part of the County's cause of action, or any assignment it may have is not involuntary or without any act of the parties, but is purely voluntary and comes into operation by reason of the act of the parties in the contract freely and voluntarily entered into between them. The Supreme Court, early in a leading case, stated [28] that one of the reasons for the passage of the statute was to protect the Government from problems arising as a result of the multiplication of the number of persons with whom the United States must deal. *Goodman v. Niblack*, 102 U. S. 556. Here the so-called assignment of a portion of the claimant's cause of action increases the number of persons with which the government must deal to 72.

It necessarily follows from what is said that the motion of the defendant to dismiss the action of the plaintiff Home Insurance Company, both individually and in its representative capacity should be sustained upon each of the grounds set out in the motion, and,

Therefore, It Is Ordered and this does order that the action of the Home Insurance Company against the defendant, both individually and in its representative capacity, be and the same hereby is dismissed.

Done and dated this 25th day of February, 1948.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Feb. 25, 1948. [29]

Thereafter, on March 23, 1948, Notice of Appeal was duly filed herein, as follows, to-wit:

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Cascade County, Montana, and The Home Insurance Company, New York, on behalf of itself and all other insurance companies, similarly situated, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order of the District Court of the United States, District of Montana, Great Falls Division, entered in this action on 25 February, 1948, dismissing the action of The Home Insurance Company, both individually and representing all other insurance companies similarly situated, against the defendant, The United States of America.

Dated this 11th day of March, 1948.

/s/ H. R. EICKEMEYER,
429 Ford Building,
Great Falls, Montana,
Attorney for Appellants.

/s/ LaRUE SMITH, JR.,
411 Ford Building,
Great Falls, Montana,
Attorney for Appellants.

[Endorsed]: Filed March 23, 1948. [31]

Thereupon, on March 23, 1948, a copy of Notice of Appeal was mailed to the attorney for the defendant herein, the Clerk's docket entry of such mailing being as follows, to-wit: [32]

[Title of District Court and Cause.]

CLERK'S DOCKET ENTRY

March 23, 1948. Mailed copy of notice of appeal to United States Attorney, Billings, Montana. [33]

Thereafter, on March 31, 1948, Designation of Contents of Record on Appeal was duly filed herein, in the words and figures following, to-wit: [34]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellants designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this case:

1. Complaint.
2. Defendant's motion to dismiss The Home Insurance Company, both individually and in its representative capacity as a party plaintiff.
3. Notice of hearing on the above motion.
4. Judgment and order dismissing The Home Insurance Company, both individually and in

its representative capacity, as a party plaintiff.

5. Notice of appeal.

6. The designation.

Dated this 31st day of March, 1948.

/s/ H. R. EICKEMEYER,

/s/ LaRUE SMITH, JR.,

Attorneys for Appellants.

Service of foregoing Designation and receipt of a copy thereof this 31st day of March, 1948.

JOHN B. TANSIL,

U. S. Attorney.

FRANKLIN A. LAMB,

Ass't. U. S. Attorney.

[Endorsed]: Filed March 31, 1948. [35]

In the District Court of the United States in and for the District of Montana, Great Falls Division.

CERTIFICATE OF CLERK

United States of America,

District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting

of 36 pages, numbered consecutively from 1 to 36 inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 993, Cascade County, Montana, et al, versus The United States of America, designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Eight and 60/100ths Dollars (\$8.60), and have been paid by the appellants.

Witness my hand and the seal of said Court at Great Falls, Montana, this 12th day of April, A. D. 1948.

[Seal]

H. H. WALKER,
Clerk.

By /s/ ELIZABETH C. McKEE,
Deputy. [36]

[Endorsed]: No. 11898. United States Circuit Court of Appeals for the Ninth Circuit. Cascade County, Montana, and The Home Insurance Company, New York, Appellants, vs. United States of America, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the District of Montana.

Filed: April 16, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11898

CASCADE COUNTY, MONTANA and THE
HOME INSURANCE COMPANY, New York,
on Behalf of Itself and All Other Insurance
Companies, Similarly Situated,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT of POINT TO BE RELIED
UPON AND DESIGNATION OF RECORD
FOR PRINTING

Comes now Cascade County, Montana, a municipal corporation, and The Home Insurance Company, New York, both individually and in its representative capacity on behalf of all other insurance companies similarly situated, appellants in the above entitled cause, and state the point on which they intend to rely in this court in this case is:

That The Home Insurance Company, New York, subrogee of the appellant, Cascade County, Montana, both individually and in its capacity as a representative party for all insurance companies similarly situated, is a necessary and proper party to this cause of action arising under the Federal Tort Claims Act against the United States of America; and the District Court of the United States

of America, District of Montana, Great Falls Division erred in its judgment and order dismissing the action of The Home Insurance Company, New York, both individually and in its representative capacity, against the United States of America;

And further states that the whole of the record as certified to the above entitled court is necessary to consideration of this case on appeal.

Dated this 21st day of April, 1948.

/s/ H. R. EICKEMEYER,
/s/ LaRUE SMITH, JR.,
Counsel for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 23, 1948.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CASCADE COUNTY, MONTANA, and
THE HOME INSURANCE COMPANY,
NEW YORK, On Behalf of Itself
and All Other Insurance Companies
Similarly Situated,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS

H. R. EICKEMEYER
429 Ford Building
Great Falls, Montana

SMITH & SMITH
411-415 Ford Building
Great Falls, Montana
Attorneys for Appellants

**Upon Appeal From The District Court of the United States
for the District of Montana**

Filed.....

FILED
JUL 26 1948

Clerk

PAUL F. O'BRIEN,
CLERK

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorneys for Appellants

Upon Appeal From The District Court of the United States
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I.

STATEMENT OF JURISDICTION

A. *District Court Jurisdiction.*

The necessary jurisdictional facts appear from the appellants' *complaint* as follows: Each of the appellants is a corporate legal entity entitled to commence a cause of action in its own right and name. (Tr. p. 2) This cause of action was commenced in the District Court of the United States in and for the District of Montana, Great Falls Division, the district wherein the act or omission complained of occurred. (Tr. pp. 2 and 3) This cause of action involves a claim for money only, (Tr. pp. 3 and 10) accruing after January 1, 1946. (Tr. pp. 3 and 5) The claim arose on account of damage to and loss of property owned by the appellant, Cascade County, Montana, caused by the negligent and wrongful acts or omissions of officers and employees of the United States of America, appellee, acting within the scope of their office or employment. (Tr. p. 3) The appellant, The Home Insurance Company, New York, and seventy-one (71) other insurance companies similarly situated on whose behalf it acts as representative party, are all subrogee claimants, subrogated to the rights and claim of the appellant, Cascade County, Montana. (Tr. pp. 5-10)

The District Court of the United States, in and for the District of Montana, had original and exclusive jurisdiction to hear, determine, render judgment, and completely adjudicate any cause of action or claim arising out of the foregoing facts under the sovereign's statutory consent to be sued granted by the Federal Tort Claims Act. (Pub. Law 601, Title IV—Federal Tort Claims Act, Section 410 (a); 28 USCA, Sec. 931)

B. *Circuit Court of Appeals Jurisdiction*

On February 25, 1948, the Court below entered a *Decision and Order* dismissing the action of appellant, The Home Insurance Company, New York, both individually and in its representative capacity, which, upon expiration of the time allowed for appeal, would have been final and conclusive of said appellant's claim both individually and as representative party. (Tr. p. 31) On March 23, 1948, the appellants filed a *Notice of Appeal* (Tr. p. 32) and on March 31, 1948, filed a *Designation of Contents of Record on Appeal* (Tr. p. 32), copies of both of which documents were served on the appellee (Tr. pp. 33 and 34), all within the time allowed for making an appeal.

Jurisdiction of the United States Circuit Court of Appeal for the Ninth Circuit is claimed under the provision of the Federal Tort Claims Act as follows: "Final judgments in the district courts in cases under this part shall be subject to review by appeal—(1) in the circuit courts of appeal in the same manner and to the same extent as other judgments of the district courts;" (Pub. Law 601, Title IV—Federal Tort Claims Act, Sec. 412 (a); 28 USCA Sec. 933 (a) 1). The provision of the federal statutes applicable to "other judgments of the district courts" is as follows: "The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—First. In the district courts, in all cases save where a direct review of the decisions may be had in the Supreme Court under section 345 of this title." (28 Judicial Code, Sec. 128, as amended; 28 USCA Sec. 225)

II.

STATEMENT OF THE CASE

On August 9, 1946, in the County of Cascade, State of Montana, United States Army Air Forces personnel, whose names are unknown to the appellants, all employees and officers of the United States of America, appellee, acting within the scope of their office and employment, flew three A-26 bomber type aircraft in such a reckless, careless and negligent manner that one of said aircraft crashed into Horse Barn "A," located on the Cascade County Fair Grounds and which was the property of the appellant, Cascade County, Montana, causing a fire which entirely destroyed said barn, causing a property damage in the total sum of \$18,685.00. (Tr. p. 3)

On the day of this damage the appellant, The Home Insurance Company, New York, and 71 other insurance companies had contracts of insurance in force insuring the appellant, Cascade County, Montana, against loss or damage by fire or aircraft. (Tr. pp. 4 and 5) On account of these insurance contracts all of these companies became liable to pay and, on December 28, 1946, did pay to Cascade County, Montana, the sum of \$8,550.00 (Tr. p. 5), being the sum of the pro rata shares paid by each of said companies under their respective policies of insurance (Tr. pp. 6 and 9) and the total liability of all the companies under all the policies according to the contract terms. (Tr. pp. 13-15)

On July 31, 1947, the appellants herein filed their complaint initiating this cause of action under the Federal Tort Claims Act. The insurance companies involved being 72 in number, it was impracticable to bring them all before the court in their individual capacity so The Home Insurance

Company, New York, was made a party plaintiff in its individual capacity and as a representative party on behalf of the 71 other insurance companies similarly situated as listed in the complaint.

On October 14, 1947, the appellee filed a *Motion to Dismiss The Home Insurance Company Both Individually and In Its Representative Capacity, as a Party Plaintiff and Notice of Hearing Motion to Dismiss*. (Tr. pp. 17-18) The motion came on for hearing and on February 25, 1948, the court below entered its *Decision and Order* (Tr. pp. 19-31) dismissing the action of the appellant, The Home Insurance Company, New York, both individually and in its representative capacity on the following grounds, as stated by the court below:

“(a) That the Federal Tort Claims Act does not provide a remedy for a claim based upon subrogation rights and prohibits the prosecution of such a claim by a subrogee; and

“(b) That this action is in conflict with and prohibited by the provisions of the Assignment of Claims Act, 31 USC 203.” (Tr. p. 20) The sole question raised on this appeal is whether or not this *Decision and Order* was in error.

III.

SPECIFICATION OF ERROR RELIED UPON

The appellant, The Home Insurance Company, New York, subrogee of the appellant, Cascade County, Montana, both individually and in its capacity as a representative party for all insurance companies similarly situated, is a necessary and proper party to this cause of action arising under the Federal Tort Claims Act against the appellee, United States of America; and the *Decision and Order* of

the court below dismissing the action of The Home Insurance Company, New York, both individually and in its representative capacity, was in error.

IV.

SUMMARY OF ARGUMENT

A. *Assignment of Claims Act, 31 USCA Sec. 203, is not applicable to claims under the Federal Tort Claims Act, 28 USCA Sec. 921 et seq., of subrogee insurers acquired by operation of law.*

B. *The Federal Tort Claims Act, 28 USCA Sec. 931, includes subrogee insurers as claimants within its scope and effect.*

1. The express language of the statute includes subrogees as claimants.
2. Legislative history of the statute supports inclusion of subrogees as claimants.
3. Doctrine of *inclusio unius est exclusio alterius* supports inclusion of subrogees as claimants.

C. *Under Montana law, an insurer, compelled to pay an insured because of damage caused by a tortfeasor, is subrogated pro tanto to the insured's right of action to recover from the tortfeasor and is a necessary and proper party to the cause of action.*

V.

ARGUMENT

A. ASSIGNMENT OF CLAIMS ACT, 31 USCA SEC. 203, IS NOT APPLICABLE TO CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT, 28 USCA SEC. 921, ET SEQ., OF SUBROGEE INSURERS ACQUIRED BY OPERATION OF LAW.

The *Decision and Order* of the court below was partly based upon 31 USCA Sec. 203, for convenience referred

to herein as the Assignment of Claims Act, the applicable portion of which is as follows:

All transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claims, or any part or share thereof shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. (Title 31, Sec. 203, USCA; R. S. Sec. 3477, May 27, 1908, C. 206, 35 Stat. 411.)

In construing the applicability of this statute, the United States Supreme Court has recognized a clear distinction between voluntary assignments and assignments by operation of law; and the court has repeatedly held this statute does not apply to assignments of claims against the United States, or interests therein, caused by operation of law. A complete statement of the applicable rule of settled law was made in the case of *National Bank of Commerce of Seattle vs. R. E. Downie, Trustee*, 218 U. S. 345, 31 S. Ct. 89, as follows:

In this connection it must be said that this court has held the statute in question does not embrace the transfer of a claim against the United States, where the transfer has been by operation of law, not merely as a result of voluntary assignment by the claimant. In *Erwin vs. United States*, 97 U. S. 392, 397, 23 L. Ed. 1065, 1967, this court, speaking by Mr. Justice Field, after referring to the act of 1853, embodied now in Sec. 3477 of the Revised Statutes, to prevent frauds upon the Treasury, said that it "applies only to cases of voluntary assignment of demands against the government. It does not embrace

cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy is not the evil at which the statute is aimed; nor does the construction given by this court deny to such parties a standing in the court of claims." This construction of the statute was recognized as settled law in *Goodman vs. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *St. Paul D & R Co. vs. United States*, 112 U. S. 733, 28 L. Ed. 861; *Butler vs. Goreley*, 146 U. S. 303, 36 L. Ed. 981; *Hager vs. Swayne*, 149 U. S. 242, 37 L. Ed. 719; *Ball vs. Halsell*, 161 U. S. 72, 40 L. Ed. 622.

A tort claim is based upon the single indivisible liability of the tortfeasor; and it is a settled equitable doctrine that an insuring company compelled to pay for damage caused by the negligence of another is, by operation of law, subrogated *pro tanto* to any cause of action the insured may have against the tortfeasor.

Regan v. N. Y. and New England Ry. Co.,
60 Conn. 124; 22 A. 503, 25 Am. St. Rep. 306

*Standard Marine Ins. Co. v. Scottish Metropolitan
Assurance Co.*,
283 U. S. 284, 51 S. Ct. 371

Brown v. Vermont Mut. F. Ins. Co.,
83 Vt. 161, 74 A. 1061, 29 L. R. A. (ns) 698

Pattitucci v. Gerhardt,
206 Wis. 358, 240 N. W. 385

Home Mut. Ins. Co. v. Oregon Ry. and Nav. Co.,
20 Ore. 569, 23 Am. St. Rep. 151

Blashfield on Negligence, page 206, Vol. 11

American Jurisprudence, page 999, Vol. 29

American Jurisprudence, page 707, Vol. 50

And even without express subrogation terms in the insurance contract, the insurer has an equitable right of subrogation by operation of law.

The Liverpool & Great Western Steam Co. v. Phenix Insurance Co.,
129 U. S. 397, 9 S. Ct. 469

The Atlas, 93 U. S. 302

Mobile & Montgomery R. Co. v. Jurey & Gillis,
111 U. S. 584, 4 S. Ct. 566

Phenix Ins. Co. v. Eric & Western Transp. Co.,
117 U. S. 312, 6 S. Ct. 750, 1176

It follows that the claim of an insurer, subrogated to a cause of action accruing to its insured under the Federal Tort Claims Act, does not fall within the prohibition of the Assignment of Claims Act which is applicable only to voluntary assignments and not to transfers of title by operation of law.

Wojciuk et al. v. United States,
74 F. Supp. 914

Niagra Fire Ins. Co. v. United States,
766 F. Supp. 850

Forrester v. United States,
75 F. Supp. 272

Hill v. United States,
74 F. Supp. 129

This court, in the case of Employers' Fire Insurance Company et al. vs. United States of America et al., 167 Fed. (2nd) 655, has held the Assignment of Claims Act does not apply to claims of subrogee insurers of claimants under the Federal Tort Claims Act. The court said:

The Government finally seeks to invoke the limitations of the Anti-Assignment Act, 31 USCA S. 203. The Act has reference only to voluntary assignments of claims against the United States, and not to transfers of title by operation of law. *Western Pacific Railroad Co. vs. United States*, 268 U. S. 271; *Morgenthau vs. Fidelity and Deposit Co.*, 94 F. 2nd 632.

Based on the foregoing authorities, it is submitted that the Assignment of Claims Act is inapplicable to this cause

of action; and that the *Decision and Order* of the court below is in error in holding the Anti-Assignment Act prohibits claims of subrogee insurers under the Federal Tort Claims Act and should, therefore, be reversed.

B. THE FEDERAL TORT CLAIMS ACT, 28 USCA SEC. 931, INCLUDES SUBROGEE INSURERS AS CLAIMANTS WITHIN ITS SCOPE AND EFFECT.

1. *The express language of the statute includes subrogee claimants.*

The specific language of the Federal Tort Claims Act which defines the class of claims included within the scope of its operation and the extent of Government liability, is as follows:

Subject to the provisions of this title, the United States District Court . . . shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States . . . on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.* Subject to the provisions of this title, the United States shall be liable in respect of such claims *to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances*, except the United States shall not be liable for interest prior to judgment or for punitive damages. (Emphasis added. Part 3, Sec. 410 (a) Public Law 601, Title 28, Chapter 20, Section 931 (a) USCA)

When the language of a statute is plain and unambiguous, there is no occasion for construction.

U. S. v. Missouri Pac. Ry. Co.,
49 S. Ct. 133, 278 U. S. 269

Russell Motor Car Co. v. U. S.,
43 S. Ct. 428, 261 U. S. 514

In re Kunkle,
40 F (2nd) 563

U. S. v. Chicago, St. P. M. & O. Ry. Co.,
34 F (2nd) 812, (aff. 43 F (2nd) 300, 71
A. L. R. 507)

Kelleher v. French,
22 F (2nd) 341, (aff. 49 S. Ct. 35. 278 U. S.
563)

U. S. v. Ninety-Nine Diamonds,
72 C. C. A. 9, 139 F 961; 2 L. R. A. (ns) 185,
(Cert. Den. 26 S. Ct. 760, 201 U. S. 645)

The purpose of the Federal Tort Claims Act is to grant a remedy and relief, by process in the Federal Courts, in cases where the United States is a tort feisor, to all claimants who would be entitled to bring a tort action and secure such relief under the laws of the state where the tort occurred. The plain, concise and unambiguous language of this statute puts the United States, as a party defendant in a tort action, in exactly the same position as a private individual would be under the law of the forum where the tort occurred. The act then goes on to define the extent of the liability of the United States by providing it shall be liable in respect of tort claims "to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances." By employing the language it did, it is clear and unequivocal that Congress intended to and did include subrogees as one class of claimants to which the United States granted its consent to be sued and to be liable in an action under the Federal Tort Claims Act. Admitting such a statutory

consent of the United States to be sued must be strictly construed, no other conclusion is tenable under this statute without ignoring or distorting the express language used.

Although a relatively new question, the contention of the appellants, that the express language of the Federal Tort Claims Act includes subrogee insurers as claimants within its scope and effect, is now supported by several decisions.

Tozen of Amherst v. United States,
77 F. Supp. 80

Charles Grace et al. v. United States,
76 F. Supp. 174

Insurance Co. of North America v. United States,
76 F. Supp. 951

Niagara Fire Ins. Co. v. United States,
76 F. Supp. 850

Wojciuk et al. v. United States et al.,
74 F. Supp. 914

Hill v. United States,
74 F. Supp. 129

South Carolina State Highway Dept. v. United States,
(Unreported, Eastern Dist. S. Carolina, June 15, 1948)

Employers' Fire Ins. Co. et al. v. United States et al.,
167 F. (2nd) 655; (reversing *Rusconi v. United States*, 74 F. Supp. 723)

Further, counsel has been advised that the United States Circuit Court of Appeals for the Sixth Circuit on June 3, 1948, handed down an opinion supporting appellants' contention and reversing the decision in *Old Colony Ins. Co. vs. United States*, 74 F. Supp. 723. This decision, however, has not been read by counsel for appellants and is still unreported.

In reaching the conclusion contended for by the appellants, the courts have advanced several sound reasons.

In the case of *Niagara Fire Insurance Co. vs. United States*, *supra*, Judge Medina, said:

As said by Judge Cardoza, writing for the New York Court of Appeals in *Anderson vs. Hayes Construction Co.*, 243 N. Y. 140, 153 N. E. 28, 29 (1926): "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

This same language of Judge Cardoza was quoted with approval as applicable to determination of the proper construction of the Federal Tort Claims Act in the case of *South Carolina Highway Dept. et al. vs. United States*, *supra*, and by this court in *Employers' Fire Insurance Co. et al. vs. United States et al.*, *supra*.

In the case of *Insurance Company of North America vs. United States*, *supra*, the court said:

A clearer or more sweeping waiver of immunity than that contained in Sec. 410 of the Act, 28 USC 931, is not easily phrased. Jurisdiction is granted "on any claim against the United States . . . under circumstances where the United States, if a private person, would be liable to the claimant for such damage . . . in accordance with the law of the place where the act or omission occurred," and further, "the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances. . . ." That can mean here no less than it says—that the United States may be sued for torts of negligence whenever an individual in Virginia may be sued. So bald is this declaration of sueability that no ground for construction seems available. No intimation arises to outlaw a subrogee and concededly Virginia would allow him to sue.

In the case of *Wojciuk et al. vs. United States et al.*, *supra*, the court said:

Furthermore, the history of the tort claims legislation strongly indicates there is no proper basis for the narrow construction urged by the government. Congress was greatly burdened by the large number of claims, based upon alleged negligence by employees of the federal government, presented at every Congressional session. Senators and Representatives were forced to spend on these multitudinous claims an amount of time disproportionate to their relative importance. When the Legislative Reorganization Act of 1946, 60 Stat. 812, was passed, Title IV thereof was the Federal Tort Claims Act. Members of Congress undoubtedly sighed in relief over the shift of the burden of determining merits of such negligence claims to the federal courts. It would be a strained and unwarranted interpretation of the intention of Congress to say it planned to give the district courts jurisdiction of cases brought by claimants originally suffering loss, but to reserve to itself the consideration of the claims of those standing in the shoes of original claimants by operation of law.

The reasoning of the court in the above case was sanctioned by this court in *Employers' Fire Ins. Co. vs. United States*, *supra*, when the court said:

When the Legislative Reorganization Act of 1946, 60 Stat. 812, was passed, Congress shifted the burden of determining negligence claims to the Federal Courts in Title IV of that Act, namely, the Federal Tort Claims Act. Congress must have had in mind the existence of liability insurance and of the then existing practice in regard to subrogated claims. In fact, the attention of the House Claims Committee was specifically directed to the point by the Assistant Attorney General. Had Congress intended to exclude subrogated claims, it could have made provision similar to that in the Foreign Claims Act, 31 USCA s 244 (d), which contains the phrase, "including claims of insured but excluding claims of subrogees." We think that with this historical background the failure to expressly exclude subrogated

claims is strong evidence of an intention to include them. It does not seem reasonable to suppose Congress intended to transfer the power of determining original claims to the Federal Courts and to retain for itself the determination of claims of subrogees.

In the case of the South Carolina State Highway Dept. et al. vs. United States of America (unreported), Judge Waties Waring said:

There is no reason or just basis for taking the position that the government is liable and must respond in damages for the tortious acts of its employees to one who did not have the foresight to protect himself by insurance, but that for equally negligent and tortious acts it is saved from reimbursement where prudence has effected insurance coverage. Would not this put a premium upon fraud and deception whereby insurance coverage would be kept secret and real parties in interest would be concealed, because to show the truth would negative a just claim. And so I am constrained not merely by weight of reasoned authority, but also by a sense of common fairness and justice to hold the insurance companies, the subrogees in this case, are entitled to become plaintiffs in their own rights and names, and I refuse to grant the motion to dismiss.

2. *Legislative history of the statute supports inclusion of subrogees as claimants.*

In the case of Niagara Fire Insurance Co. et al. vs. United States, supra, the opinion of Judge Medina contains a thorough analysis of the legislative history of the Federal Tort Claims Act and a comparison of that act with analogous acts governing other kinds of claims against the United States. The court concluded:

Accordingly, the plain meaning of the words of the statute, the intention of the Congress as manifested in its legislation on other allied and analogous subjects, the historical background of the Act itself and the reasons which led to its enactment, all point in the same direction.

Section 931 must be deemed to have conferred upon the appropriate district courts jurisdiction to entertain and determine the claims of subrogees. This conclusion would seem also to dispose of the defenses to the effect that plaintiffs are not the real parties in interest.

This court has sanctioned the conclusion of the above case in its opinion in *Employers' Fire Insurance Co. et al. vs. United States et al.*, supra, saying:

The narrow construction urged by the Government finds no basis in the legislative history of the Federal Tort Claims Act nor in a comparison with analogous federal legislation. Prior to the enactment of the Federal Tort Claims Act, certain categories of claims, not in excess of \$1,000.00 were disposed of administratively by virtue of the Small Tort Claims Act. Claims in excess of \$1,000.00 were presented directly to Congress. The Small Tort Claims Act provided that the head of each department could determine any claim "on account of damage to or loss of privately owned property where the amount of the claim does not exceed \$1,000.00." In connection with this language, the problem arose as to whether subrogated claims were included, and the Attorney General, on June 29, 1932, rendered an opinion that claims of subrogees were covered by the statute. (36 Op. Atty. Gen. 553) This interpretation of language nearly identical to that employed in the Federal Tort Claims Act was consistently followed by Congress in appropriating sums of money for the payment of subrogated claims thus certified; and moreover, a like interpretation was placed by the Comptroller General on other statutes in *pari materia*, containing the language "on account of damage to or loss of privately owned property." 19 Comp. Gen. 503, 506-7, Nov. 18, 1939; 21 Comp. Gen. 341, Oct. 17, 1941; 22 Comp. Gen. 611, Jan. 7, 1943. See *Niagara Fire Ins. Co. vs. United States*, (S. D., N. Y.) March 22, 1948.

Since the enactment of the Federal Tort Claims Act on August 2, 1946, and the commencement of litigation in-

volving the claims of subrogee claimants under that act, the House and Senate Judiciary Committees have had under consideration legislative bills to completely revise Title 28 of the United States Code, which includes the Federal Tort Claims Act.

Chapter 646, Public Law 773, 80th Congress.

The bill containing this complete revision, second session, was finally passed by the Senate on June 12, 1948, with amendments concurred in by the House on June 16, 1948. It was approved by the President on June 25, 1948, to become effective on September 1, 1948.

Several revisions were made in the Federal Tort Claims Act. It is significant that the language of the Act construed by this court and the several district courts was not changed. And although there were changes in phraseology of the section listing the twelve exceptions from the Act, there was no change to include subrogees as an exception. (Title 28, U. S. C., Congressional Service, pp. 1934-1937, 1636-1639, 1571)

Congress must have been aware of the litigation involving subrogee claimants under the act.

The Act was amended as late as June 12, 1948, by the Senate. Had Congress intended to exclude subrogees as claimants, it certainly would have done it at the time of complete revision of Title 28.

3. *Doctrine of Expressio Unius Est Exclusio Alterius supports inclusion of subrogees as claimants.*

In the case of *Wojciuk et al. vs. United States et al.*, *supra*, the court said.

Congress exercised great care in designating twelve different categories of claims which the Federal Tort Claims Act was not intended to cover. The claims here in question were not included in any such classification.

The familiar maxim of interpretation, *expressio unius est exclusio alterius*, may be invoked. It is my opinion that plaintiff Casualty Company, as a subrogee of Wojciuk, is a proper claimant under the act.

And this reasoning in support of appellants' contention has been sanctioned by this court in *Employers' Fire Insurance Co. vs. United States*, *supra*, when the court said:

In the Federal Tort Claims Act, Congress, though granting jurisdiction generally to the Federal Courts to render judgment on "any claim," designated twelve categories of claims to which the Federal Tort Claims Act was not meant to apply. Claims of subrogees were not included therein. Had Congress intended to exclude subrogated claims, it would have undoubtedly designated them as one of the categories which the Act was not meant to cover.

Based on the foregoing authorities appellants submit in conclusion that the Federal Tort Claims Act includes subrogee insurers as claimants within its scope and effect.

C. UNDER MONTANA LAW, AN INSURER, COMPELLED TO PAY AN INSURED BECAUSE OF DAMAGE CAUSED BY A TORT FEASOR, IS SUBROGATED *PRO TANTO* TO THE INSURED'S RIGHT OF ACTION TO RECOVER FROM THE TORT FEASOR AND IS A NECESSARY AND PROPER PARTY TO THE CAUSE OF ACTION.

The section of the Federal Tort Claims Act conferring jurisdiction on the federal district courts empowers them to hear, determine and render judgment on tort claims against the United States "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death *in accordance with the law of the place where the act or omission*

occurred." Thus, the Montana law governing the rights of an insurer as a subrogee is made applicable to this case.

It has long been settled in Montana that when an insurer is compelled to pay an insured because of a loss or damage to property caused by negligence of another, the insurer is subrogated *pro tanto* to the insured's right of recovery against the tortfeasor.

This rule was first announced in Montana in the case of Caledonia Insurance Co. vs. Northern Pacific Ry. Co., 32 Mont. 46, 79 Pac. 544, the defendant's negligence destroyed a building owned by the insured, Harn, valued at \$1,068.00, for which loss the plaintiff insurance company paid the insured \$800.00 under the insurance contract. The insurance company then sued separately and in its own name to recover the amount of this payment from the tortfeasor. In deciding this case, the Montana Supreme Court said:

The next inquiry is, Was such a cause of action assignable? For subrogation is merely an equitable assignment, or an assignment by operation of law. Section 1351 of the Civil Code provides: "A thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner." It is clear in this instance Mrs. Harn's cause of action arose out of the violation of a right of property, and such a right of action or thing in action, is declared by this section assignable. . . . A general rule respecting the extent of the right acquired by subrogation in an action of this character is given in 27 Am. & Eng. Enc. of Law (2nd Ed.) 260, as follows: "If insured buildings or other property are destroyed through the fault or negligence of some person other than the owner, the insurance company upon payment of the loss, will be subrogated to the right of the owner to recover from the wrongdoer. This right of subrogation is frequently

enforced against railroad companies which have become liable to the owners of property on account of fires caused by their locomotives. And in some jurisdictions the right is confirmed by statute. The rights of the insurer against the wrongdoer can be no greater than those of the insured, and its recovery will be limited to the amount which it has paid on the loss."

The same language of the Montana code quoted by the court first appeared in the Civil Code of 1895, has been re-enacted in successive codes, and is now Section 6805 of the Revised Codes of Montana 1935.

The rule of the Caledonia Case was recognized and applied by the Montana Federal District Court in *Gaugler vs. Chicago M. & P. S. Ry. Co.*, 197 Fed. Rep. 79. In that case, four non-resident insurance companies, compelled to pay part of loss caused by defendant's negligence, joined with the insured in the cause of action to recover from the tortfeasor. The question was whether or not the defendant could remove the cause from the state to the Federal court on grounds of diversity of citizenship on a separable controversy. The court, making a thorough analysis of the Montana law, said:

These insurers by subrogation are equitable assignees, proportionate to the payments by them made to the insured, of parts of the insured's right of action against the defendant, the insured retaining part to himself. This assignment takes on all the aspect, in effect, of one by the most formal and express deed. *Hall vs. Railway Co.*, 13 Wall. 370, 20 L. Ed. 594; *Railway Co. vs. Insurance Co.*, 139 U. S. 235, 11 Sup. Ct. 554, 35 L. Ed. 154; *Railway Co. vs. Car Co.*, 139 U. S. 87, 11 Sup. Ct. 490, 35 L. Ed. 97; *Wager vs. Insurance Co.*, 150 U. S. 108, 14 Sup. Ct. 55, 37 L. Ed. 1013; *U. S. vs. Tobacco Co.*, 166 U. S. 474, 17 Sup. Ct. 619, 41 L. Ed. 1081.

How these assignees shall assert their partial interests is a matter of parties and process, and depends upon the

laws of Montana; for therein, and by virtue of the conformity statute, in common law causes the Federal courts follow the state law wherein the court is held. *Thompson vs. Railway Co.*, 6 Wall. 138, 18 L. Ed. 765; *Albany, etc. vs. Lundberg*, 121 U. S. 454, 7 S. Ct. 958, 30 L. Ed. 982; *Delaware Co. vs. Safe Co.*, 133 U. S. 488, 10 S. Ct. 399, 33 L. Ed. 674; *Glenn vs. Marbury*, 145 U. S. 508, 12 S. Ct. 914, 36 L. Ed. 790; *Railway Co. vs. Eckman*, 187 U. S. 434, 23 S. Ct. 211, 47 L. Ed. 245. These cases declare the rule that, though an assignee of a chose in action whose right is equitable in that the legal title is in the assignor might sue in equity and at common law must sue in the name of the assignor, yet, if the state law permits him to sue in his own name, it furnishes a complete and adequate remedy, and he cannot merely because his interest is an equitable one maintain a suit in equity therefor in the federal courts on removal or otherwise. So that if the laws of Montana authorize the maintenance of this action as brought, and if the insurers are not mere nominal parties otherwise fully represented in the action, this court is without jurisdiction, and the case must be remanded.

The point here involved does not seem to have been expressly decided by the Montana Supreme Court, but in *Caledonia Insurance Co. vs. Railway Co.*, 32 Mont. 46, 70 Pac. 544, an insurance company appears to have maintained without question an action, in its own name and alone, against a trespasser for recovery for a partial loss payment by it made to the insured. And it is common knowledge of the bench and bar of Montana, that on the theory that assignees in whole or in part of a chose in action are real parties in interest within the statutes of the state, since the enactments of said statutes, assignees of the entire chose have sued in their own names and assignees of part thereof have sued jointly with their assignors in the names of both, either without question or questioned unavailingly. Statutes like Montana's are for the purpose of changing the common law rule that rights of action are not transferable, and that all actions should be prosecuted by or in the name of the holder of the legal title to the cause of action, under which rule an assignee of the whole was compelled to

sue at law in the name of the assignor, and an assignee of part had no standing in a court of law, but in some cases could resort to equity. Blending law and equity in one form of civil action, such statutes adopt the equity rule in respect to parties—the action to be prosecuted in the name of and by the owner of the beneficial interest in the chose, who is entitled to the thing sued for, and by reason thereof is the real party in interest. See 30 Cyc. 47 et seq. 83. . . . Under like statutes to those aforesaid of Montana, it is generally held that insurers who have paid part of a loss may join with the insured in an action in the names of all against the trespasser to recover the whole loss. *Insurance Co. vs. Railway Co.*, 45 Or. 53, 76 Pac. 1075, 67 L. R. A. 161, 2 Ann Cas. 360; *Fairbanks et al. vs. Railway Co.*, 115 Cal. 579, 47 Pac. 450; *Wunderlich et al. vs. Railway Co.*, 93 Wis. 132, 66 N. W. 1144; *Railway Co. vs. Insurance Co.*, 53 Neb. 514, 73 N. W. 950; *Railway Co. vs. Miller*, 27 Tex. Civ. App. 344, 66 S. W. 139; *Insurance Co. vs. Railway Co.*, 41 S. C. 408, 19 S. E. 859, 44 Am St. Rep. 725; See, also, *First, etc., Society vs. Railway Co.* (C. C.) 7 Fed. 260; *Insurance Co. vs. Railway Co.* (C. C.) 101 Fed. 509. These statutes abolish the frictions and technical rules of the common law in relation to assignments, parties and process, and simplify forms, procedure, and proceedings. They make for convenience and justice to all parties. The reasons for said rules failing, the rules fail with them. Use plaintiffs have no place in actions in Montana. The insured cannot sue to the use of the insurers and the insurers cannot sue to their use in the name of the insured.

I am of the opinion that the plaintiffs herein, co-owners of the insured's right of action, were not only authorized by the state law to sue jointly as they did, but were compelled to do so. One compelled to join and joined in an action, and having a substantial interest therein, is not a nominal, but a necessary or indispensable party, whose citizenship must be regarded when jurisdiction depends on citizenship; for he sues not by a representative nor by representation binding him and

bound for him, but in his individual capacity. He is a real party in interest.

Based on the foregoing authorities, the appellants submit that under Montana law, made applicable to this cause of action by the Federal Tort Claims Act, an insurer compelled to pay an insured because of damage caused by a tortfeasor, is subrogated *pro tanto* to the insured's right of action to recover from the tortfeasor and is a necessary and proper party to the cause of action; and that the *Decision and Order* of the court below is in error in dismissing the action of the appellant, The Home Insurance Company, New York.

VI.

CONCLUSION

The appellants submit that since a subrogee insurer has a right of recovery against a tortfeasor under Montana law, such subrogee insurer is a claimant within the scope and effect of the Federal Tort Claims Act and a necessary and proper party to a cause of action under that act. The *Decision and Order* of the court below dismissing the cause of action of the appellant, The Home Insurance Company, New York, both individually and in its representative capacity, is, therefore, in error and should be reversed by this court, and this cause of action remanded to the court below for further proceedings accordingly.


This brief is filed for and on behalf of the appellants, Cascade County, Montana, and The Home Insurance Company, New York, both individually and in its representative capacity, and each of them, in connection with this appeal taken by and allowed to said parties.

Respectfully submitted,

H. R. EICKEMEYER

429 Ford Building

Great Falls, Montana

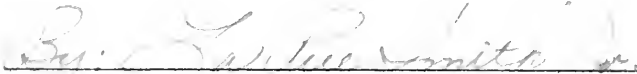


SMITH & SMITH

411-415 Ford Building

Great Falls, Montana

Attorneys for Appellants.



No. 11899

United States
Circuit Court of Appeals
For the Ninth Circuit

ERMELINDO ESCOBEDO and LEO ESCO-
BEDO, Claimants of One 1947 Model Ford V8
Station Wagon Automobile,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
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FILED

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**NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD**

MR. MERLE C. GROENE,
319 Securities Building,
Billings, Montana.

Attorney for Appellants and
Libelees-Claimants.

MR. JOHN B. TANSIL,
United States District Attorney,
Billings, Montana.

MR. FRANKLIN A. LAMB,
Assistant United States District Attorney,
Billings, Montana.

Attorneys for Appellee and Libelant.

In the District Court of the United States in and for
the District of Montana, Billings Division

No. 953

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE 1947 MODEL FORD V8 STATION WAGON
AUTOMOBILE, Motor Number 20 327, bear-
ing Montana 1947 License Number 22-T1307,
together with its tools, parts, accessories and
appurtenances (Seized from Ralph Melendrez,
Emerlindo Escobedo and Leo Escobedo),
Libelees.

Be It Remembered that on April 23, 1947, a Libel
of Information was duly filed herein, being in the
words and figures following, to wit: [2*]

[Title of District Court and Cause.]

LIBEL OF INFORMATION

To the Honorable, the Judge of the District Court
of the United States, in and for the District
of Montana:

The United States of America, in its own right,
by Franklin A. Lamb, Assistant Attorney of the
United States, in and for the District of Montana,
its proctor, brings this libel of information against

*Page numbering appearing at foot of page of original certified
Transcript of Record.

the libelees above named, and against all persons lawfully intervening for their interest therein, in a civil cause of forfeiture, for a breach of the Indian Liquor Laws of the United States of America, and upon information and belief alleges as follows:

I.

That at all times herein mentioned the libelant was and now is a sovereign power; and that the above-entitled Court has jurisdiction herein for the reason that the United States is the party libelant, and said cause is brought under the Indian Liquor Laws of the United States of America.

II.

That on or about the 12th day of April, 1947, on the Northeast Quarter of the Southeast Quarter of Section 3, [3] Township 2 South, Range 33 East, Montana Principal Meridian, in the County of Big Horn, being the land on the right side of the road, and the North Half of the Southwest Quarter, Section 2, Township 2 South, Range 33 East, Montana Principal Meridian, in the County of Big Horn, being the land on the left side of the road, at a point on the county road about 2.9 miles from the city of Hardin, in the County of Big Horn, within the boundaries of the Crow Indian Reservation, in the State and District of Montana, and within the jurisdiction of this Court, Louis B. Harwood, Special Officer, U. S. Indian Service, and William Grudzinski, Police Officer for the City of Hardin,

4. *Ermelindo Escobedo and Leo Escobedo*

Montana, seized on land the following described automobile and motor vehicle, to wit:

One 1947 Model Ford V8 Station Wagon Automobile, Motor Number 20 327, bearing Montana 1947 License Number 22-T1307, together with its tools, parts, accessories and appurtenances.

III.

That previous to the seizure above-described, Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo had wilfully, wrongfully and unlawfully introduced and conveyed into said Crow Indian Reservation, which said Indian Reservation was at all times herein mentioned, ever since has been, and now is Indian country, a quantity of a certain vinous and intoxicating liquor, to wit: wine, a more particular description of said vinous and intoxicating liquor being to this informant unknown, by means of said automobile and motor vehicle, and at said time and place the said Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo were then and there in the possession of said vinous and intoxicating liquor in said automobile and motor vehicle, which was then and there, and had been theretofore, used in introducing and conveying said vinous and intoxicating liquor, [4] as aforesaid, into said Indian country, where the introduction thereof is, and was, at all of the times herein mentioned, prohibited by treaty and Federal statute and contrary to the

form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America.

IV.

That by reason of the premises the said automobile and motor vehicle has become and now is subject to forfeiture and condemnation; and that before the commencement hereof the seizure above mentioned was adopted by the Superintendent of Indian Affairs of the said Crow Indian Reservation, and said automobile and motor vehicle is now in his possession and stored at the Agency Garage at Crow Agency, Big Horn County, Montana.

Wherefore, libelant prays that due process issue herein to enforce said forfeiture; that a time and place be fixed for the trial and hearing of this libel upon due notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed and that upon said hearing said automobile and motor vehicle be condemned and forfeited to the United States and that the same be sold or otherwise disposed of as provided by law.

FRANKLIN A. LAMB,

Assistant Attorney of the United States,
in and for the District of Montana.

United States of America,
District of Montana—ss.

Franklin A. Lamb, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant Attorney of the United States, in and for the District [5] of Montana, and as such, makes this verification to the foregoing libel of information; that he has read the said libel of information; and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

FRANKLIN A. LAMB.

Subscribed and sworn to before me this 22nd day of April, 1947.

[Seal] DALE F. GALLES,
Notary Public for the State of Montana, Residing
in Billings, Montana.

My commission expires April 15, 1949.

[Endorsed]: Filed April 23, 1947. [6]

Thereafter, on May 2, 1947, an Information was duly filed in Criminal Case No. 7779, United States of America vs. Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo, in the words and figures following, to wit: [7]

[Title of District Court and Cause.]

No. 7779

INFORMATION

The United States Attorney Charges:

Count One
(Introducing)
(25-241)

(Max: 1 yr. and \$500)

That the above-named defendants Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo, whose true names are to the informant aforesaid unknown, on or about the 12th day of April, 1947, within the boundaries of the Crow Indian Reservation, in the State and district of Montana, and within the jurisdiction of this Court, did, then and there, wilfully, wrongfully and unlawfully introduce into said Crow Indian Reservation a quantity of a certain vinous and intoxicating liquor, to wit: wine, the exact quantity and character of which are to the informant aforesaid unknown, the said Crow Indian Reservation then and there being an Indian country and under the exclusive jurisdiction of the United States; contrary to the form, force and effect of the statute in such case made and provided, and

against the peace and dignity of the United States of America. [8]

Count Two

(Possession)

(25-244)

(Max: 1 yr. and \$500)

That said Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo, whose true names are to the informant aforesaid unknown, on or about the 12th day of April, 1947, within the boundaries of the Crow Indian Reservation, in the State and district of Montana, and within the jurisdiction of this Court, a more particular description thereof being to this informant unknown, did, then and there, wilfully, wrongfully and unlawfully have in their possession a quantity of a certain vinous and itoxicating liquor, to wit: wine, the exact quantity and character of which are to the informant aforesaid unknown, the said Crow Indian Reservation then and there being Indian country where the introduction of intoxicating liquor is, and at all of the time herein mentioned, was, prohibited by treaty and Federal statute, and under the exclusive jurisdiction of the United States; contrary to the form, force and effect of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

FRANKLIN A. LAMB,

Assistant Attorney of the United States,
in and for the District of Montana.

Thereafter, on June 17, 1947, the Answer of Ermelindo Escobedo, et al, was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

No. 953

ANSWER OF ERMELINDO ESCOBEDO, LEO
ESCOBEDO AND WALTER McLAUGH-
LIN, DOING BUSINESS AS MOUNTAIN
STATES INSURANCE COMPANY, LIEN
CLAIMANT

Comes now Ermelindo Escobedo and Leo Escobedo, two of the above named Libelees, and Walter McLaughlin, doing business as Mountain States Insurance Company, lien claimant, and answering the Libel of Information herein, admit, deny and allege as follows:

1. Admit the allegations of Paragraphs 1 and 2, thereof.

2. Answering Paragraph 3, thereof, these answering Libelees and lien claimant deny that previous to the seizure above described, or at any other time, or at all, that Ermelindo Escobedo and Leo Escobedo had wilfully, or wrongfully, or unlawfully introduced or conveyed into said Crow Indian Reservation a quantity, or any wine or other vinous or intoxicating liquor by means of said automobile and motor vehicle; admit that upon the said search some wine was found in said car in the possession of one Ralph Melendrez, but deny that they, or said automobile was being used for the purpose of intro-

ducing or conveying said wine into Indian Country; deny that it had therefore been so used, and deny each and every allegation of said paragraph.

3. Deny that by reason of the allegations of Paragraph 3, or otherwise, or at all, that said automobile has become or is now subject to forfeiture or condemnation as therein set forth, or otherwise, or at all. As to the allegations that the seizure was adopted by the Superintendent of Indian Affairs of the Crow Indian Reservation libelees and lien claimant allege that they have no knowledge or information thereof sufficient to form a belief and therefore deny the same; admit that said automobile is in the Agency Garage at Crow Agency, Big Horn [11] County, Montana.

Further Answering Said Libel of Information Libelees and lien claimant allege: That at the time of the seizure of said automobile, the said Ralph Melendrez was a guest in said automobile, was not driving the same, and had no dominion over the said automobile; that when the said automobile was seized the wine referred to in the Libel of Information was wine that had been carried into said automobile by the said Ralph Melendrez; that at no time preceding the said seizure nor at the time of said seizure did these answering Libelees and lien claimant have any information whatsoever, or any knowledge or notice that the said Ralph Melendrez had carried wine into said automobile, or that said automobile contained any wine.

Having so answered said Libel, Libelees and lien claimant pray that, by proper order of this Court the said automobile be released and ordered forth-with delivered to the said Ermelindo Escobedo and Leo Escobedo, and the said Walter McLaughlin.

MERLE C. GROENE,

Attorney for Libelees and
Lien Claimant.

Service of the within admitted and a copy had this 13th day of June, 1947.

/s/ JOHN B. TANSIL,

United States Attorney.

By FRANKLIN A. LAMB,

Asst. United States Attorney.

[Endorsed]: Filed June 17, 1947. [12]

Thereafter, on July 24, 1947, the Reply of the Libelant, United States of America, was duly filed herein, in the words and figures following, to wit:

[Title of District Court and Cause.]

REPLY

Comes now the United States of America, the libelant herein and for its reply to the answer of the libelees herein, and for its reply, admits, denies and alleges:

I.

That as to that portion of libelees answer designated as further answer, the libelant has no knowledge nor information concerning the allegation

therein contained and for that reason denies each and every allegation and the whole thereof, and further alleges that the libelees and the said Ralph Melendrez were on a joint venture and that the libelees had knowledge of the presence of intoxicating liquor in said automobile prior to its introduction into the Indian country.

Wherefore having fully replied to the answer of libelees and the lien claimant, the libelant prays that said automobile be forfeited and that such other and further orders issue as may be just and proper.

JOHN B. TANSIL,

United States Attorney in and for the District of
Montana.

FRANKLIN A. LAMB,

Assistant United States
Attorney.

[Endorsed]: Filed July 24, 1947. [14]

Thereafter, on November 3rd and 4th, 1947, the Criminal Case No. 7779, United States vs. Ralph Melendrez, et al., was duly tried before a jury, the record of said trial being as follows, to wit:

Be it Remembered that this cause came on regularly for hearing in the United States District Court, in and for the District of Montana, Billings Division, before the Honorable Charles N. Pray, with a jury, in the Federal Building at Billings, Montana, on November 3rd and 4th, 1947.

Whereupon the following proceedings were had and done, to wit:

The Court: No. 7779, United States vs. Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo. Gentlemen, are you ready in this case?

Mr. Lamb: Yes, your Honor.

Mr. Groene: We are.

The Court: Call a jury.

The jury was regularly and duly impaneled and sworn.

(The defendant Ralph Melendrez having previously entered a plea of guilty in this cause.)

LOUIS B. HARWOOD

called as a witness for the plaintiff, testified as follows:

In April, 1947, I was employed by the United States Indian Service, with headquarters at Crow Agency, Montana.

My chief job was the suppression of liquor among Indians. At the present time I live in Washington, D. C., and am no longer in the employ of the United States Government.

Q. Mr. Harwood, in April, 1947, was some complaint made to you concerning Ermelindo Escobedo?

Mr. Groene: Just a moment. If the court please, we object to any testimony as to any complaints being made. There is nothing here as to any claim of unlawful search or seizure.

(Testimony of Louis B. Harwood.)

The Court: Of course, he can show how this matter was set on foot or started, that pursuant to certain complaints [16] that come to him he proceeded to make an investigation. That may be shown if that is the fact. Is that what it is?

Mr. Lamb: Yes, sir.

The Court: Very well, but we will not go into the complaints or anything of that sort.

In April, 1947, complaint was made to me concerning Ermelindo Escobedo. I saw him on April 12, 1947, at Hardin, Montana, but the complaint was made to me before that time. On the 12th of April, I also saw Leo Escobedo and Ralph Melendrez. I left on the evening of April 12th, about seven p.m. I was on duty and went to Hardin, Montana. I was making regular investigations. I saw the defendants during the evening at Hardin, and, due to receiving a complaint a few days before, I watched Ermelindo Escobedo and Leo Escobedo especially. It was approximately eleven p.m. The city police officer and I were parked across the street from the Stockman Bar; that is on Third and Central Avenue in Hardin. We saw Leo Escobedo, Ralph Melendrez and another Mexican by the name of J. H. Robinson come out of the Stockman Bar. When they came out they had some paper bags in their arms. They started walking west on Central Avenue towards Railroad Street. I started up my car. I was driving and Bill Grudzinski, the other police officer, was in the front seat with me. I saw the

(Testimony of Louis B. Harwood.)

defendant Ermelindo Escobedo get out of his car, which is a station wagon, parked on Railroad Street near Central Avenue, and also near the depot. He got out of his car on the left side which, I am sure, was the middle door or middle seat in the station wagon. In a station wagon they have three rows of seats and when the others walked up, Leo Escobedo, Ralph Melendrez and Robinson, Ermelindo walked around in back of the car and got in the front seat. These parcels were put in the car and Leo Escobedo got in the car in the driver's seat and defendant, Ralph Melendrez, got in [17] one of the back seats. I continued to drive on until I came to the railroad track and I made a "U" turn in the street. Just as my car turned around in the street they were backing out of the curb and they started driving towards Third and Central Avenue, which is the highway. I continued to follow. When they came to U. S. Highway 87 they stopped at the stop sign and made a left turn and continued on driving out the highway. I followed a short distance behind them, accompanied by Grudzinski. We went out on the highway in the direction towards Billings, where the road turns off to St. Xavier, and they made a left turn on the pavement and drove on the St. Xavier road. We followed close behind for about three miles from the city limits of Hardin, and I turned my siren on and they stopped their car. Leo Escobedo was driving and when I turned the siren on he stopped immediately. When he stopped I

(Testimony of Louis B. Harwood.)

drove in behind their car, and he stopped on the right-side lane and I stopped a few feet behind their car and left my lights on. I went up to Leo Escobedo and told him I wished to search the car and that I had reason to believe there was liquor in it. Before he or anyone else could say anything the defendant Ralph Melendrez jumped out of the car. He was sitting in the middle seat on the left side. He jumped out of the car and commenced cussing the officers and was threatening me especially. Grudzinski was close behind me in front of my car and he was calling me names and threatening what he was going to do if he could get hold of me and walked toward me. I backed up and at the same time I told them all to get out of the car and get in the front of their headlights. Melendrez kept up his cussing and caused a great deal of disturbance by making these little girls in the back seat have hysterics and they commenced to scream and beg him not to start any fight. All the time he [18] was trying to get hold of me and I was telling him to get in front of the car with the other occupants who were out most of them there in front. The Escobedos were very good in obeying my orders to get out in front of the car. It was necessary for me after I told defendant Melendrez to stay back there and get in front of the car and the threats he was making, for me to hit him in the jaw with my fist. After I hit him and knocked him into the car he jumped up and made a run for me and before he reached me

(Testimony of Louis B. Harwood.)

Leo Escobedo and his brother, Manuel Melendrez, came up and grabbed hold of him and dragged him to the front of their car and held him down. It was at this point that I searched the car and found two full jugs of wine in paper bags, still intact, and another jug that was in a paper sack that had a little wine left in it. I found the wine in the back seat, clear in the back. The car was a Ford V-8, License No. 22-T1307. It was a model 1947 station wagon, Motor No. 20327. It was admitted that the car was on the Crow Indian Reservation at the time of the finding of the wine. After I seized the wine I put it in my car and I told the defendant Leo Escobedo and all of them to get in the car and to drive back to the county jail in Hardin, in which he was very cooperative all the way through. We followed them back to town.

When we arrived at the county jail at Hardin, they were told to drive around in the alley, the entrance to the Sheriff's office. We told them to get out of the car, we were going in the Sheriff's office. Roy Riley, the Sheriff of Big Horn County, came up and unlocked the door and we all went in. We did not have trouble with the Escobedos, but we had plenty with Melendrez. It was necessary for the Sheriff and I to use force to put him in a cell. There was no trouble at all with the Escobedos. They were confined to the jail [19] that night also. I told the defendant Leo Escobedo that due to the fact that I found liquor in his car on the reservation

(Testimony of Louis B. Harwood.)

I would have to ask him to forfeit the keys of the car to me, which he did, and the car was locked up that night and left in the custody of the Sheriff. Subsequently the three were arraigned before a United States Commissioner.

The jug of wine marked Government's Exhibit 1 was one of the jugs of wine which I removed from the car. Government's Exhibit 2 was one of the jugs removed from the car. The third jug, a full jug of wine, was left in charge of the Superintendent of the Crow Indian Reservation, but I do not know what became of it.

Exhibits 1 and 2 were admitted in evidence without objection.

On cross-examination Louis B. Harwood testified as follows:

At the time that I was Indian Agent, or Police Officer for the Indian Service, and about the time this incident happened there were times that cars which were forfeited were turned over to the Indian Department, to be used when the director requested it.

As to who told me that Mr. Escobedo was selling whiskey or liquor to Indians, I received an unsigned letter through the mail at Crow Agency on April 4th. I have the letter here. It was never determined just who was the writer of the letter. Previous to receiving this letter we had received complaints of the defendants bootlegging at St. Xavier. I do not remember what their names were.

(Testimony of Louis B. Harwood.)

I would say approximately two or three months after I arrived at Crow, in 1946, I started receiving complaints. I can name one of the persons, Max Bigman, who had been employed at the Crow Agency on the police force. He named the Escobedos. As to whether or not he had any evidence he just told me verbally. [20] No investigation was made other than watching the defendants. He told me there wasn't any liquor evidence. He was just telling me what he thought about it. There wasn't anything for me to base an investigation on, or make an arrest on or do anything. When I got this unsigned letter I really started in on them.

Witness was then handed an instrument marked for identification purposes as Defendants' Exhibit No. 3 and testified that it was a substantially correct representation of the location of the various buildings on one side of the main street in Hardin. Without objection Defendants' Exhibit No. 3 was admitted in evidence.

Witness continuing:

I was not looking especially for the Escobedos' car. That wasn't my main purpose for going to Hardin. As I recall, it was a Saturday night. When I first came to town I don't recall where I parked. When I first saw the station wagon belonging to the Escobedos it was parked right up here by the depot back of the bus stop. I marked Exhibit No. 3 with an X to indicate where I first saw it. At that time I was in my car with the police officer from Hardin.

(Testimony of Louis B. Harwood.)

I did not stop and park alongside of it. I had it under observation all the time until the time it was stopped on the highway on the reservation. I first saw the station wagon parked there by the depot around eleven o'clock p.m. I knew that someone was inside and I know the defendant Ermelindo Escobedo got out and got back in. I marked a Y on Defendants' Exhibit No. 3 to designate the point where I was when I saw these men come out of the Stockman and that Y is marked in front of the drug store and right across from the Stockman. When they came out of the Stockman they were walking. We were parked at the point marked Y. They came up the street on the sidewalk, crossed the highway and I started my car and drove along the [21] street slowly. I did not see the station wagon until after they came out of the Stockman. I followed them down the street and they came to the station wagon and that is where I saw Mr. Escobedo, the old man, get out of the car. I had never seen the station wagon before that time that night. I had been parked across from the Stockman about fifteen or twenty minutes. As to who I saw come out of the Stockman, I saw Leo Escobedo. I did not see the old man come out. Ralph Melendrez came out and a man, I believe he gave his name as J. H. Robinson. Melendrez was carrying two parcels and, I believe, Leo was carrying one or two small parcels. I believe Mr. Robinson was carrying one or two parcels. I did not know what was in those

(Testimony of Louis B. Harwood.)

parcels at that time, but I found out later. They were jugs of wine of the size of Government's Exhibits 1 and 2. I said Ralph Melendrez had two packages. They could have been something else. Defendant Melendrez told me verbally he bought this wine in the Stockman. He told me about eleven o'clock. I saw all of these parcels put into the car. We did not make any inquiry at the Stockman as to what they bought and what they carried out of there. The policeman and his wife were in the car when we went out and stopped the station wagon. I don't know whether I saw lots of people carrying packages or not that night. I don't remember that I told Leo Escobedo that I saw him bring a package out of the Stockman, or that he told me that he had a sack of apples and a carton of cigarettes. I don't remember any conversation like that. I searched the station wagon thoroughly. I did not make a list of what I found there. Not at the time for groceries or anything. Everything that was in the car was turned over to Manuel Melendrez. He was released that night because Ralph Melendrez was the father of the two little girls in the car. I told Manuel Melendrez, [22] brother of the defendant, to take his nieces and take care of them for the night because I would have to hold the car. I also told him to take what groceries and other stuff they had in there. I never made a list of what I got out of the car. I never got anything else but the liquor. The car is stored at Crow Agency. As to the children, I believe the old-

(Testimony of Louis B. Harwood.)

est was thirteen, a little girl. I told their uncle, Manuel, to look after them.

On redirect examination witness was asked to produce the unsigned letter and the envelope, bearing a postmark of St. Xavier, Montana, and dated April 3, 1947, which was marked for identification as Government's Exhibit No. 4. Under the objections of defendants Government's Exhibit No. 4 was admitted in evidence. This exhibit was in the following language:

"Mr. Harwood

This is from a friend this Manuel Melendrez and a man they call Slick is doing a good job of bootlegging to the Indians this Slick I have been told that the F.B.I. run him out of California for handling dupe. And Emil Escobedo is selling to the Indians If they run this Slick off the county would be better off"

WILLIAM GRUDZINSKI

called as a witness, testified as follows:

I live at Hardin and am a police officer of the City of Hardin. I was with Louis B. Harwood, Special Indian Officer, on the evening of April 12, 1947. In his automobile around eleven o'clock that night. It was in front of the drug store and right across the street from the Stockman. At that time I saw the two defendants, Ermelindo Escobedo and Leo Escobedo, near the Stockman Bar. I saw them

(Testimony of William Grudzinski.)

when they were first coming out. There were three of them came out. I am not too familiar [23] with the names; one was Robinson and two Escobedos. When they came out of the Stockman they went down towards the depot where the station wagon was parked. When they pulled out Mr. Harwood followed them back up to Highway 87. When they came out of the Stockman Bar they were carrying paper sacks. We didn't know for sure what it was, but the opinion we thought it was liquor. When they got to the station wagon the paper sacks were put into the car. We followed the station wagon out approximately three miles. The Escobedos stopped the car in response to the siren. Harwood asked the Escobedos if they had liquor in the car and they said no. He asked them to get out of the car and in front of the lights, and they did. I would say there were five or six people in the car. I am not definitely sure. After the Escobedos got out of the car Ralph Melendrez got rough and kept threatening Harwood. Harwood conducted a search of the car and found two gallons of wine and a part of a gallon of wine. He put it in his automobile and told the Escobedos to get back in the car and head back towards the court house. They drove back to the court house and the Sheriff, Roy Riley, unlocked the office and everyone went into the Sheriff's office. Ralph Melendrez was swearing.

On cross-examination witness testified that the relative that Mr. Harwood asked to look after the

(Testimony of William Grudzinski.)

children was one of the men he saw coming out of the Stockman Bar.

I saw Mr. Escobedo, the old man, come out, and Mr. Robinson. One of the Melendrez came out, but I didn't know it finally. I am not sure now Mr. Escobedo, Senior, was in the station wagon that he came out of it. I saw him go into the station wagon carrying one or two packages. They were small articles. They were not as big as the jugs of wine, but I don't know what was in the packages. Leo Escobedo was carrying packages, one or two, and they were about the size of that jug of [24] wine. Robinson was carrying one or two fair size packages. I won't say for sure that they were as big as the bottles of wine. I did not see Ralph Melendrez coming out of the Stockman at the same time. As to whether Mr. Harwood said he came out and whether he was mistaken, I am not sure of that. If Mr. Harwood testified he saw Ralph Melendrez come out of the Stockman I am not saying that he was mistaken, but I didn't see him come out. My wife was with me. I didn't say that we saw them put the articles in the station wagon from where we were parked in front of the drug store. We drove down the street. We were three-fourths of the block down the street when we saw them put the packages in the station wagon. They were walking a regular natural walk and they didn't stop anywhere. I had no warrant when I left town with Harwood. The station wagon was stopped, but I didn't ask them if they had any liquor. There were several

(Testimony of William Grudzinski.)

kids in the car. I didn't go in the car when the search was made and I don't know what was in the car. It was approximately around eleven that night when I saw the packages put in the station wagon. I don't remember whether it was a dark night or not. That night was the first time I had ever seen the defendant, Ralph Melendrez. I recognize him and he was not one of the men that came out of the Stockman. Mr. Harwood made the arrest and I was merely accompanying him as an officer generally.

MAX BIGMAN

was called as a witness and testified:

At the time of this case I was Chief of Police at Crow Agency. I have been a peace officer on the Crow Indian Reservation for about four years. During the time that I was Chief of Police at Crow Agency complaints were made to me concerning the Escobedos selling liquor to the Indians on the Reservation. My information came mostly from Indians and Mr. Ford, who lives at St. Xavier, was one of them who spoke to me about it two or three times.

On cross-examination the witness continued: [25]

The first reports I had about it was a year ago this summer off and on. I did not make any investigation. I reported it to Harwood. I do not know myself of any sales of liquor by the defendants.

Witness was handed Government's Exhibit No. 4, the anonymous letter, and testified:

It haven't no name on it.

At this time the government rested

The first witness for the defense was

PAUL SHALLER

who testified substantially as follows:

I reside at St. Xavier. I am a fieldman for Holly Sugar and I have a store. I have lived there for about fourteen years. I have known Leo Escobedo and his father for seven years. Their occupation during that time has been raising beets. I have had occasion in my work to come in contact with them. They are very good beet raisers. They have been making money out of their beets right along. I have never heard anyone remark about these men being engaged in the selling or giving liquor to Indians. The reputation of both of these men in the vicinity where they live for truth, honesty and being law abiding citizens is good.

On cross-examination witness testified:

The Escobedos live about four miles south of St. Xavier. I am not very well acquainted with Ralph Melendrez. He came there last spring. He did not live with the Escobedos. He lived in the St. Xavier colony house of the Holly Sugar and then he moved on a ranch north of St. Xavier. I saw the Escobedos during the beet season about once or twice a week, other times about once a week for about five minutes at a time. In addition to their own land and work they irrigate for Mr. Hawks. I don't know what they do in their spare time. A beet grower doesn't usually have too much spare time. They come to my store once in a while and do some trading there.

F. M. LIPP

was called as a witness: [26]

I live at Hardin, Montana, and am in the Big Horn Bank there. I have known the defendants Leo Escobedo and his father about six or seven years, and they have transacted business with me. I know where they live. In their transactions with my bank they have substantial amounts of money. I know they have made money. I know their reputation for truth, honesty and being law abiding citizens is good.

On cross-examination witness testified:

They are indebted to the bank in substantial amounts at the present time.

CARL McGARRITY

was called as a witness and testified substantially as follows:

I live at St. Xavier, where I run a general store and I am the Postmaster. I have been there about twenty-five years. I have known Leo Escobedo and his father about six years. They are beet farmers and I see them quite frequently. I have never heard any reports about either one of these defendants engaged in selling or giving liquor to Indians. I know their reputation for truth, honesty and being law abiding citizens and it is very good.

On cross examination witness testified:

They trade at my store and are indebted to me at the present time.

CLYDE HAWKS

was called as a witness and testified:

I live about eight miles south of St. Xavier. I have lived there since 1931. I am a farmer and rancher. I know Leo Escobedo and his father. I have known them approximately seven years. They lease and farm land belonging to me. In addition to raising beets, in their spare time they work for me by the day or month. I would say they are quite busy all the time. Their income has been very substantial. I get around St. Xavier; I stop in there and buy groceries or gas. I have never any reports coming to me that either one of these defendants were engaged in selling or giving liquor to Indians. Their reputation for being truthful honest men and law abiding citizens is good.

On cross-examination witness testified that he countersigned the Escobedo note.

RALPH MELENDREZ

called as a witness for defendants, testified substantially as follows:

I have a small place of my own north of St. Xavier. I came to St. Xavier about the 17th day of March. Before that I lived at Denver. I lived at the colony house at the Holly Sugar Company. At that time I did not know Leo Escobedo, but I had met the old man. I met him on a prior visit a year ago last April. As to the incident at Hardin, on the 12th day of April, we were out spreading fertilizer

(Testimony of Ralph Melendrez.)

and Mr. Escobedo's truck broke down and I was employed to repair the truck. They came over to St. Xavier that afternoon and I found it necessary in order to repair the truck to get some new parts, and that was the purpose of the trip to Hardin. The Escobedos came over to St. Xavier in their station wagon and we left St. Xavier about four o'clock that evening. In the station wagon there was Manuel, my brother, Leo and Mr. Escobedo, four of my children and myself. The children were 7, 8, 10 and 13 years of age, respectively. I took them in to buy them some shoes. The station wagon first stopped at Hardin between Ricker's drug store and the Big Horn Bar. I went to the garage. I marked a little zero on the plat at the place where the car was parked. I gave my daughter a twenty-dollar bill so that she could buy shoes for herself and the other kids. We went to the Ford Garage, the Escobedos and myself. The parts were ordered. When I left, the Escobedos were still at the garage. I went to the liquor store and I bought three half gallons of wine. I had a permit and I signed the slip. I bought the wine between five-thirty and six o'clock. The liquor store is not on the main street. I put it in the station wagon on the floor in the back seat. [28] The wine was in separate sacks. Later on I met Pete Autobee and Robinson. We went to the Farm Cafe and had something to eat. I got one of the bottles and took it in and we drank wine in there. After we finished with the wine I put the wine bottle back in the car, in the back seat on the floor. There are three seats.

(Testimony of Ralph Melendrez.)

Anyone getting in the driver's seat could not readily see the wine. I saw the Escobedos after that, about eight o'clock. I met them on the corner. They were coming from the Big Horn Bar. I was with them from that time on until we were ready to go home. As to Mr. Harwood's testimony that I came out of the Stockman with two other fellows, carrying packages, and that I told him that I bought the wine and got it in the Stockman, that is not true. I was not in the Stockman about the time we started to go home that night. I was with Mr. Escobedo in the Arcade. We had several beers there before we left. The Arcade is across the street from the Hardin Hotel. I am marking the plat with an A. We did not go to the Stockman at all after we stopped at the Arcade. As to whether or not the car was moved, I don't know. Leo was the one driving. I didn't see him from eight o'clock on until we were ready to go. Mr. Escobedo said it was about time to go home. I did not know the station wagon was parked by the depot, but I walked down with the old gentleman and Pete Autobee. The children were there in the car. They were asleep. They had the back seat occupied and they had their packages in there, too. We were in the station wagon just a minute or two when the rest of the party came. I took it upon myself to put the wine in the station wagon. I did it without Mr. Escobedo's permission and he didn't know a thing about it and I said nothing to him. I was taking it out for my brothers. There are five or seven out there and they want a drink occasion-

(Testimony of Ralph Melendrez.)

ally. I never said anything to Leo Escobedo at any time about having wine in the car and as far as I know they had no knowledge [29] or any reason to suspect that there was wine in the car. I did not know anything about the Indian liquor laws at that time. I did not know that it was a crime against the federal laws to transport liquor into the Indian Reservation and for that reason I never thought anything about it. When we got ready to leave we all got in the car and went up Highway 87 and turned left on the St. Xavier road and went about a mile and a half south of the tracks. When Harwood blew the siren Leo drove off to the side and stopped. Harwood got out of the car and ordered us all out and he said he wanted to search the car and I wouldn't leave him. I was drunk and we had a scuffle and he knocked me down a couple of times. After Harwood searched the car he ordered Leo to drive back to the court house. Harwood went out and rounded up the other officers. When I was arraigned I entered a plea of guilty of having this wine on the Reservation. At this particular time when I came back to Montana, I didn't know Leo for he was in the service. I didn't stay with the Escobedos and I was simply employed to repair the truck.

On cross-examination the witness testified:

I had been in California before I moved to Denver. In the spring of 1946 I came to the Crow Indian Reservation on a two-weeks' vacation. My folks had been in that valley since 1939, and I came

(Testimony of Ralph Melendrez.)

up to see them. After that I went back to California. I then went to Denver, and came up here in the spring. I have never made any other visits up here. I knew it was against the law to sell liquor to the Indians, but I didn't know it was against the law transporting it for your own use. It is approximately twenty-five miles from St. Xavier to Hardin. When we went to Hardin, at the garage I left a list of parts that were needed, and the Escobedos stayed there with the garage man and I went out and got this wine. I had the wine in three separate sacks. No one was with me when I bought them. [30] Then I walked back to the station wagon and put them on the floor between the second and third seats. I don't know where the Escobedos were. I didn't see them until about eight that evening. I would say it was around 5:30 to 5:45 when I put the jugs of wine in the car. The truck parts the Escobedos ordered we could not get that night because they had to call Billings and Sheridan. The Escobedos stayed to get the parts they were just ordering and there was a ring gear and other parts that they could not get so they decided to let it go until they could get it all. There were no packages in the car when I put the wine in. I waited in the car. I don't know where the Escobedos were. I have never asked them since. I suppose they were at some bar drinking. The old man drinks. Leo doesn't drink. I didn't go around the bars looking for them. I didn't sit in the car and drink any wine. My children came and I stood there until I met Autobee and we went into the

(Testimony of Ralph Melendrez.)

Farm Cafe. We didn't have any special time to go back home. Robinson and Autobee came up to the car and we went to the Farm Cafe at that time and had a cup of coffee and sandwiches. I did not take one of the jugs of wine with me then. It was after we had our coffee. Then I came out and got one of the jugs. The children were in the car. At that time there were some packages in the car, the children's shoe packages. They put on their new shoes and put their old shoes in the packages. The four children were sitting in the back seat. I opened the door and reached in and got the jug of wine.

Q. So then you went back in the cafe and you and Robinson and Pete drank this gallon of wine?

A. Well, there was two other fellows.

Q. And how long were you in there?

A. Oh, hour and a half, hour and fifteen.

Q. And then you went out looking for the Escobedos?

A. No, sir, I went out on the street and they was [31] coming from immediate at the time the Mission Inn and was coming across the street I suppose from the Stockman; it is located across the street.

Q. They were coming from the general direction of the Stockman Bar? A. Yes.

Q. And this was about what time?

A. Oh, eight o'clock, eight fifteen.

Q. And you had been in the cafe all the time up until the time you saw Escobedo coming from the Stockman Bar, is that right? A. Yes.

(Testimony of Ralph Melendrez.)

Q. Did you see them as soon as you walked out the door of the Farm Cafe? A. No.

Q. How long were you out in the street before the Escobedos came along?

A. I wasn't out there very long, not over ten minutes.

Q. Did you walk out of the Farm Cafe and walk up toward the Stockman Bar?

A. No. Stockman, no, not just then. We were out there talking a while.

Q. Did Robinson and this Autobee come out of the Farm Cafe, too? A. Yes.

Q. And the three of you stood there on the sidewalk in front of the Farm Cafe, is that right?

A. Yes, we were there approximately ten minutes and we saw them coming by the Mission Inn from the direction of the Stockman.

Q. You saw them near the Mission?

A. I saw Mr. Escobedo, the old man senior, with another man.

Q. With another man?

A. With Rodrico Mirmiontez.

Q. Where was Leo?

A. I don't know where Leo was at. [32]

Q. Now I want to get this straight. When you and Robinson and Autobee walked out——

A. Yes.

Q. Walked out of the door of the Farm Cafe you stood right there on the sidewalk for ten minutes? A. Yes.

(Testimony of Ralph Melendrez.)

Q. Until you saw Escobedo senior?

A. Yes, sir.

Q. And another man near the Mission Inn coming from the general direction of the Stockman Bar, is that correct? A. Yes, sir.

Q. And then what did you do when you saw Mr. Escobedo senior coming from up the street?

A. We walked toward them.

Q. You walked up toward them?

A. We met them on the corner of the Mission Inn.

Q. You went up to near the Mission Inn?

A. Yes.

Q. And then what did you and Mr. Escobedo do?

A. Well, from there we went to the Arcade.

Q. You and Mr. Escobedo?

A. About eight thirty, around eight forty-five, eight fifteen or eight thirty.

Q. Now are you positive that you didn't do any other thing from the time you walked out of the Farm Cafe until you got to the Arcade with Mr. Escobedo? A. Yes.

Q. Positive? A. Yes.

Q. Positive, and everything you have testified is just as true as the statement you just made. You are positive you didn't do anything else, is that right? A. I didn't do anything else.

Q. So you went over to the Arcade Bar and you and Mr. Escobedo engaged in drinking by the hour, the Escobedo senior?

(Testimony of Ralph Melendrez.)

A. We had three, maybe three or four beers.

Q. And you were in there from eight fifteen, eight thirty——

A. Eight thirty to eleven o'clock. [33]

Q. And drank three or four beers?

A. Drinking beer and conversation.

Q. These little short glasses of beer or bottles?

A. No, we were drinking bottles.

Q. You got pretty drunk?

A. Yes, sir, plenty drunk, mixed up that wine and beer and got plenty drunk.

I don't think Mr. Escobedo had a pretty good load on. He had some on, of course. Autobee was in the Arcade with us. When we left the Arcade Mr. Escobedo and Pete Autobee went with us. The car was moved during the time we were in the Arcade. I don't know where Leo was. When we got back to the car I got into the middle seat with Pete and Robinson. There were no packages of groceries or anything of the sort because Leo brought the packages afterwards. He brought them when he came about two minutes after. Escobedo Senior got into the front seat. My brother, Manuel, and Leo Escobedo got in the front seat. Leo and Robinson and my brother, Manuel, came down the street from the Stockman Bar. Leo was the only one who had any packages. He had a bag of apples and a carton of cigarettes. He took his driver's position behind the wheel. I don't know where he put the packages, but he was carrying the packages and put them in the car.

WILLIAM GRESS

a witness, was called and testified substantially as follows:

I live at Hardin. I am a bartender at the Stockman Bar. I have been tending bar there for the last four years. In April, 1947, my shift was from eight until two at night. I am acquainted with Leo Escobedo and his father. On a Saturday night, some time in April, 1947, Leo Escobedo came into the Stockman, and handed me a package, a sack which looked to me like apples, and I set it behind the bar. He asked me to save it for him when he goes home. He came in later and got the sack. [34] There were a couple of men with him. There was a carton of cigarettes laying on top. I gave it to them and they went out.

Witness was then handed a half gallon bottle of wine, marked Government's Exhibit No. 1, and further testified:

We never sell, we never have half gallon wine in the last four years. I would say that this half gallon of wine did not come out of the Stockman. We never had any like that.

On cross-examination witness testified:

It could have come out of the place, but I didn't sell it to them. They might have carried it; I didn't see it.

PETE AUTOBEE

a witness, was called and testified substantially as follows:

I live in Billings. I am a moulder at the foundry. I know Leo Escobedo, Ermelindo Escobedo, Ralph Melendrez and Manuel Melendrez. I was in the car when the car was stopped on the Crow Indian Reservation on April 12, 1947. I met Ralph Melendrez about six fifteen and we went into the Farm Cafe. I went in there and then he came in bringing a half gallon of wine and we had a few drinks. After that we walked out and stood around the street in front of the Farm Cafe for about ten minutes and then we met Mr. Escebedo and we walked over to the Arcade. I mean the old gentleman. The three of us went into the Arcade. It was probably fifteen minutes to seven before we got there. We stayed there maybe an hour or a half hour. Then I came out and went in the Mission pool hall and asked this gentleman if he would give me a ride home. I lived at St. Xavier. He said yes, to wait until he got ready to go home, so I waited until the time they went home and then I got into the car and went home with them. I got into the station wagon right there in front of the depot. I walked down the street with Mr. Melendrez and we got in the car and then the rest of them began to come in and then we left. Leo and the old man were in the front seat. We started out of town and we got past the tracks when the officers caught

(Testimony of Pete Autobee.)

up with us, stopped the car and made us get off there. They searched the car and took us [35] back. After they turned me loose we got a man to take us home. I was with Manuel and Ralph's children. The people that took us back took the kids, too.

On cross-examination witness testified:

After we had the drinks in the Farm Cafe, just me and Mr. Melendrez walked out and stood in the front of the Cafe. We stood there about fifteen minutes and then we walked over to the Arcade. We didn't go anywhere else; just met Mr. Escobedo. It was at the Arcade that I asked Mr. Escobedo for a ride.

MANUEL MELENDREZ

a witness for the defendants, testified substantially as follows:

I live at St. Xavier. I am twenty-nine years of age. I have lived there since 1939, up until January, 1942, when I enlisted in the Army. I was in the service three and one-half years, with the Eleventh Air Force in the Aleutian Islands. I was honorably discharged. I know Leo Escobedo and his father. I met them in the fall of 1939. I have been in the court room and heard some testimony about an occurrence on April 12th, 1947. I was in the station wagon when it came to Hardin, and when we got to Hardin we stopped in front of the Big Horn Inn. The Escobedos went to the Ford Ga-

(Testimony of Manuel Melendrez.)

rage to order parts for the truck. While they were there I went to Miles and Ulmer to get tractor parts. From there I went to the Ford Garage where Mr. Escobedo and Leo were talking about having the radio fixed. From there Leo and I went to the Hardin Club. That is across the street from the court house. I don't know where my brother was. We left there about nine fifteen. Then we went back to the car and took a friend of Leo's by the name of Leonard to the Hill Top. That is a club northwest of Hardin. When we came back our parking place was gone and we drove around a while and parked in front of the depot. We were sitting in the car at the time that Mr. Harwood and the police officer parked beside us. I got out of the car and went up to the Arcade and [36] told Mr. Escobedo where the car was. I also told him that Leo and I would get the packages at the Stockman. Robinson went with us. My brother was not there. Leo had a sack of apples and a carton of cigarettes at the Stockman. I carried the cigarettes and he carried the apples. We did not carry any wine out of the Stockman. I didn't even know the wine was in the car until the officers had found the bottles. If I had known they were in the car I would never have left Hardin with them. Mr. Harwood and the officer were over there watching us. I had no reason to apprehend or suspect that the bottles were in the car. Leo never put anything in the car as far as I know and he and I had nothing to drink that eve-

(Testimony of Manuel Melendrez.)

ning. As far as I know Mr. Escobedo did not put any wine in the car. When we came down to the station wagon with the cigarettes and apples, Leo handed them to his dad, who was in the front seat, and his dad handed them back to either Ralph or Pete or Mr. Robinson, who took the packages and set them in the back on the last seat. Leo got in the driver's side and I got in on the other side. There were three of us in the front seat. When the officers stopped the car Mr. Harwood asked me if there was any liquor in the car and I told him there was not and he searched me. They searched the car and found the wine and ordered us back to Hardin. There was quite a scuffle there between Ralph Melendrez and the officers.

On cross-examination the witness testified:

At the sheriff's office my brother started telling the police officer that he could whip him and they got to scuffling. Then the sheriff came and they finally got Ralph into the cell. At the time I went to tell Mr. Escobedo about moving the car I knew they were at the Arcade because I walked by and saw them in there and I told Leo.

LEO ESCOBEDO

called as a witness, testified substantially as follows:

I live at St. Xavier, Montana. I was born in Texas. I was in military service in 1945, in Okinawa. I was in twenty-two [37] months. I was a Military Policeman. I received an honorable dis-

(Testimony of Leo Escobedo.)

charge. Mr. Escobedo, Senior, is my father. There are nine children, all born in this country and all citizens of this country. With reference to what occurred in Hardin on April 12th, we went to Hardin to get some parts for our truck. My father owns the station wagon. We bought it, I believe, in March, about a month before this happened. We had to pay \$1900.00 for it. We have been engaged in business down there raising beets and general farm work and made pretty good money. I have never sold or given away any liquor to an Indian. I didn't know anyone was making such a claim until we had this trial. After we left the garage Manuel and I went up to the Hardin Club. My father stayed at the garage. We first parked the station wagon right by the Farm Cafe and the Big Horn Inn, at the point where a little circle is marked on Defendants' Exhibit No. 3. It stayed there until about nine fifteen, nine thirty. I met a friend down at the Hardin Club who wanted me to take him down to the Hill Top, and we did. When we came back there was no place to park, so we parked in front of the depot. Manuel Melendrez was with me. I don't know where my father was at that time. After we parked at the depot Manuel got off the car and made a round while I was in the car. When he came back he said that my dad was in the Arcade. While we were in the car we saw Harwood and the policeman. They were parked right alongside of us. I know what the law is about taking liquor into the Indian Reserva-

(Testimony of Leo Escobedo.)

tion. I did not put any wine or any other liquor in the car that night. I didn't know there was any there until they caught us out on the highway. I came out of the Stockman that night just before we left, and Manuel Melendrez and Jim Robinson were with us. I went in there to get a package I left there earlier in the evening that I bought, a sack of apples and a carton of cigarettes. I saw Mr. Bill Gress, the bartender, while I was in there. Manuel carried the carton of cigarettes and I carried the sack of apples. Mr. [38] Robinson had no package. I gave the sack of apples to my dad and he handed them back. I don't know who he handed them back to. I have never seen the apples or the cigarettes since. No one gave my dad a receipt for the car or its contents. When they stopped the car they asked if we had any liquor in the car. I told them I didn't have any and I had no reason to think otherwise. There were three in the front seat, and there is a seat in the middle and one in the back and there are side doors. I had no occasion to go in the back of the station wagon and look for any packages.

On cross-examination the witness testified:

When my father bought the station wagon he paid around \$700.00 cash. At the time it was seized there was about \$1400.00 due, to some finance company. It is down to \$800.00.

ERMELINDO ESCOBEDO

testified substantially as follows:

My name is Ermelindo Escobedo. I am seventy-four. I have lived in the United States since 1910, and in this section the last seven years. I have lived in St. Xavier since 1940. I own the Ford station wagon. During the time I have lived at St. Xavier I have never sold or given any liquor to an Indian. I heard the testimony in the trial and I heard that the officers found two bottles of wine and a part bottle of wine in my station wagon. The first I knew of it was when Mr. Harwood picked it up. I did not know the wine was in the car before that. No one told me the wine was in there. I had no reason to believe the wine was in there. I did not put any wine in the car and I saw no one put the wine in the car.

On cross-examination the witness testified:

That night we drank a little. Just little glasses in the beer. We had a little wine that night, yes. That was in the Arcade. As to whether or not I was around with Ralph Melendrez most of the night I can't see that putting wine into my car at [39] all. He come in the Ford Garage, come back myself and treat and Ralph he told me, Emil, you ready for part. Not yet. That is, he asked me if I had bought the parts. I told him no, not yet. He asked me if he bought the parts and he said no, Ralph, not yet. He said you want a bottle of beer and he don't care. Me ask him that is okay, let's go.

(Testimony of Ermelindo Escobedo.)

Mr. Lamb: When he says "he," he means "I."

We stayed quite a while in the garage, called up Billings for parts. I think it was about four or five o'clock when Ralph Melendrez asked me if I wanted to go over and have a drink. Maybe it was five-thirty or six. He gave me twenty dollar bill for the little girls to go buy stockings and shoes and then he made the order what was needed to fix the truck, and then he asked me if I wanted to go for a drink. Then he said he would go back to town and look for his kids and I stayed in the garage. I left the garage after a while, Leo and I. After a while I went back with Manuel and we were all three in the garage. As to when we had our first drink, Arcade and Mission and Arcade last drink. I had my first drink with Ralph about ten-thirty, I think. I had the first drink in the Mission. I was not up at the Stockman. I met Ralph in the street near the Mission Bar and we went in and then to the Arcade. We then went to the car and started home.

On rebuttal Roy Riley, Sheriff of Big Horn County, testified, but not as to facts involved here.

LOUIS B. HARWOOD

was recalled and testified substantially as follows:

I was parked earlier in the evening by the station wagon, but I was not watching the occupants of the car.

At this point, both sides having rested, a motion to dismiss was made as follows:

“Mr. Groene: Comes now the defendants Ernelindo Escobedo and Leo Escobedo at the close of the Government’s case [40] and move the court for a verdict of acquittal on each count of the information upon the following grounds and for the following reasons. Count one is the count charging the defendants with introducing into the Crow Indian Reservation wine. And count two charges the defendants with introducing into the Crow Indian Reservation wine. We submit, if the court please, there is no proof in the case whatever as to the defendants named ever having had possession of the wine in question. Even if you assume from section 245 of the code that possession is prima facie evidence, they haven’t shown the possession, and even if they had shown possession, it is sufficiently rebutted of course in this case to place back on the Government the burden to show that the wine was actually in the possession of these defendants. As I see it there is no proof in the record whatever. The testimony of the officers for the Government shows absolutely nothing. The only thing they have is the testimony of Ralph, is the admission of Ralph Melendrez to Mr. Harwood after the car was brought in that he bought the wine in the Stockman. There is absolutely no proof whatever that these defendants ever bought any wine or ever put any wine in this car, and this is a criminal case and the Government must prove the guilt of these defendants beyond a reasonable

doubt and we submit there is no proof in the record.

Mr. Lamb: Well, if the court please, of course the meaning of possession is rather a broad meaning, control of, to possess, and to exercise or be able to exercise control over the wine in question. In addition in the second count, or in the first count being charged with the introduction of the wine upon the reservation, Leo Escobedo was the driver of the automobile in which the wine was seized and the driver of that car would have then be in control of and in possession and was in the act and did introduce onto the Crow Indian Reservation the wine as charged in this indictment, and that particular fact is entirely unrefuted and in fact is admitted by the witnesses for the defense. Of course, in this particular case it is a question of [41] fact for the jury to determine whether in fact the defendants were connected with the placing of the wine in the car and whether or not they had knowledge or should have known that the liquor was in the car at the time that it was introduced and possessed upon the Crow Indian Reservation by these defendants.

The Court: Well they were seen bringing these packages out. They testified—was it Mr. Harwood testified to the bringing of the packages out?

Mr. Lamb: Both he and the other officer.

The Court: And, of course, that made them think they were placing packages of liquor in the car and bringing packages of liquor to the car. And the fact that they were all drinking and having a time of it, especially the elder Escobedo and the others, would look as if they were drinking to-

gether and having a night of it at any rate up until some eleven o'clock at night. There are so many circumstances there. Of course, it is a matter to put up to the jury for them to say whether they believe beyond a reasonable doubt that the circumstances are sufficient to draw them into the review of the testimony that the defense has submitted here, whether they have that belief that either of the Escobedos knew of the presence of the liquor in their own car after putting in the evening together and having a time of it and being seen depositing packages in the car. Those are circumstances now that and as the District Attorney says, Leo Escobedo was driving the car and he had control of it and supposedly would know what was going on, who is in it and what is in it, and what these packages were that were being deposited in the car. Now I don't think it is a very strong case to tell you the truth, but what the jury will do with it is another thing, but it seems to me there is enough here. If they were going to church and coming back from church and got in the car and started off, you wouldn't think so much about it, but where they were having a drinking bout together and they were all full evidently. [42]

Mr. Groene: Except the boy who was driving the car and the other one who didn't have a drink.

The Court: He didn't have a drink and nobody testified he had a drink. It was fortunate the driver was sober but apparently the rest of them were having a time of it, but with the packages being deposited there there's circumstances might confuse

the jury. The owner of the car and the other Escobedo ought to have known about it that they were there and should have known what they had in the trunk. I rather think I will let the case go to the jury, but as I said, I think it is a weak case and my notion would be that the jury won't do very much about it, but now we will have to let it go that way."

The court duly instructed the jury and thereafter the jury returned verdicts of not guilty as to both defendants.

[Endorsed]: Filed Feb. 3, 1948. [43]

Thereafter, on February 18, 1948, the Decision of the Court was duly filed herein, being as follows, to wit:

[Title of District Court and Cause.]

DECISION

A libel of information was filed herein for the forfeiture of the above described automobile under the Indian Liquor Laws (25 U.S.C.A. Secs. 246, 247, 248). An answer, in which a lien holder joined, was filed by the owner of the automobile denying any knowledge of the presence of intoxicating liquor in his automobile while being driven on the Indian Reservation, as alleged.

The owner, Ermelindo Escobedo, was occupying the front seat of his car, which his son, Leo Escobedo, was driving, when a special officer of the United States Indian Service intercepted the car

while being driven within the boundaries of the Crow Indian Reservation, in the District of Montana, and found near the back seat of the car, which was said to have been occupied by four children of the passenger, Ralph Melendrez, a friend of the owner, a quantity of wine, consisting of three jugs in all, of which the passenger, Melendrez, who occupied the second seat, claimed ownership.

The persons above mentioned reside on the Indian Reservation, and had driven to Hardin, Montana, to procure parts for the repair of a truck belonging to the owner of the car in question. After transacting their business, they visited some of the bar rooms in Hardin, and as the evidence shows, had been doing considerable drinking, in which it also appears that the son, the driver of the car, did not participate. To the criminal charge Melendrez entered a plea of guilty to the introduction and possession of intoxicating liquor on the Indian Reservation; the two Escobedos were tried by a jury and found not guilty of the same criminal charge. It was agreed that the testimony taken in the trial of the criminal case might be used in the civil case now under consideration. [45]

On the subject of knowledge on the part of the owner of the car the Government relies strongly on the testimony of Melendrez and Autobee developing circumstances showing that while the former was carrying the jug of wine back to the car the owner was with him, and could have seen the wine placed in the car; and, since they, the owner and Melendrez, had been drinking together at the Ar-

cade bar, and were both going together towards the car with the latter carrying the jug of wine from which the contents had been nearly emptied, the responsibility was on the senior Escobedo to know whether the wine was in the car; he must have seen Melendrez carrying it towards the car; they were both going to the car to drive away at the time, which was then about eleven o'clock at night.

Melendrez had already pleaded guilty to the criminal charge when he was called as a witness on behalf of the Escobedos, and the testimony relating to the walk to the car with the wine was developed by the District Attorney on cross-examination. This court is of the opinion that the testimony of Melendrez and Autobee in regard to the wine drinking in the cafe, with the jug in possession of Melendrez, considered in connection with the surrounding circumstances, taking into account the reiterated positive statements made by Melendrez and Autobee as to what they did, where they went, and who they met, on leaving the cafe, brings the senior Escobedo in close contact with the jug of wine that was returned to the automobile. Aside from that view of the evidence, the decision written by Circuit Judge Wilbur, when he was Senior Judge of the Circuit Court of Appeals for this Circuit, in which the other Judges concurred, under the facts disclosed in this case, would require the court to order a decree of forfeiture of the car in question, as prayed for in the libel of information filed herein. *United States v. One Chevrolet coupe*

automobile, C.C.A. 9th Circuit, 58 Fed. (2) 235, [46] and cases cited therein.

The evidence shows that the intoxicating liquor, three jugs of wine, was found by the officer near the rear seat of the automobile, and that none of the parties above named were in the car at the time of the actual seizure, having been required by the officer to step out, for the purpose of the search. As contended by the District Attorney the parties were engaged in a joint venture in their auto trip to Hardin; they were visiting drinking resorts about town for several hours before leaving, and it was undoubtedly the duty of the owner of the car to investigate and determine whether there was any intoxicating liquor near the back seat, or at any other place in the car, before driving upon an Indian Reservation; if the owner had looked, he would have seen the liquor where the officer found it a few minutes later. There is a difference in the statements of Officer Harwood and Officer Grudzinski in respect to the identity of the persons coming out of the Stockman's at about eleven o'clock that night with bundles done up in paper; one said Melendrez was one of the three coming out of the bar and the other said he was not, but irrespective of whether the wine was being brought to the car at that time, or whether it was deposited in the car several hours before, as stated by Melendrez, the three jugs of wine were found in the car by the officers on the Indian Reservation. Other witnesses explained what was being brought from

the Stockman's about eleven p.m., just before leaving for St. Xavier; they said the bundles seen by the officers were a sack of apples and a carton of cigarettes. Melendrez said he did not know about the Indian liquor laws, or that it was an offense to take liquor on an Indian Reservation; if that is true, then why did he feel obliged to conceal the three jugs of wine from his drinking companions? There seems to be an inconsistency here which has not been explained. [47]

On cross-examination of Officers Harwood and Max Bigman, it was developed that several complaints had been made to them about alleged bootlegging activities of the Escobedos, and that the former had received through the mail an unsigned letter of complaint in that respect. All of this kind of testimony consisted of rumor and hearsay and could have been excluded from the case, and while it is not evidence here, and was not considered as such, it discloses the information received by the officer upon which he acted and which resulted in the search and seizure of the automobile in this case.

The court has examined with care the able argument presented by counsel for defendant but can find therein no reasonable application to the facts under the law applicable to this case. In view of the foregoing, the decision must be for the plaintiff, and it is so ordered.

CHARLES N. PRAY,
Judge.

Thereafter, on March 27, 1948, Notice of Appeal was duly filed herein, being as follows, to wit:

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that Ermelindo Escobedo and Leo Escobedo, libelees above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order, Decision and Judgment entered in this action on the 18th day of February, 1948.

Dated March 23, 1948.

/s/ MERLE GROENE,

Attorney for Appellants.

Service of the within admitted and a copy had this 23rd day of March, 1948.

JOHN B. TANSIL,

United States Attorney,

FRANKLIN A. LAMB,

Assistant United States

Attorney.

[Endorsed]: Filed March 27, 1948. [50]

Thereafter, on April 8, 1948, Stipulation as to Record on Appeal was duly filed herein, being as follows, to wit: [51]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, as follows:

1. That prior to the trial of the criminal action it was stipulated and agreed by and between counsel, with the approval of the District Judge, that the evidence in the criminal case would be considered as the evidence in the civil case.

2. That the foregoing, consisting of 42 pages, in addition to this one, and pursuant to Subdivision (f), Rule 75 of the Rules of Civil Procedure, shall be considered as the complete record of the parts to the record, proceedings and evidence to be included in the record on appeal and as such may be certified to by the clerk of the above entitled court as the transcript of the record on appeal.

3. That heretofore and within the time allowed by law appellants duly filed in this court their bond and supersedeas on appeal.

Dated this 7th day of April, 1948.

JOHN B. TANSIL,
United States Attorney,

By FRANKLIN A. LAMB,
Assistant United States
Attorney.

MERLE GROENE,
Attorney for Libelees and
Appellants.

[Endorsed]: Filed April 8, 1948. [52]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 53 pages, numbered consecutively from 1 to 53 inclusive, constitutes a full, true and correct transcript of all portions of the record in case Number 953, United States of America, Libelant, versus One 1947 Model Ford V8 Station Wagon Automobile, et al., stipulated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Nine and 50/100ths (\$9.50) Dollars, and have been paid by the appellants.

Witness my hand and the seal of said Court at Great Falls, Montana, this 12th day of April, A.D. 1948.

[Seal] H. H. WALKER,
Clerk, U. S. District Court, for the District of
Montana.

By /s/ ELIZABETH C. McKEE,
Deputy Clerk. [53]

[Endorsed]: No. 11899. United States Circuit Court of Appeals for the Ninth Circuit. Ermelindo Escobedo and Leo Escobedo, Claimants of One 1947 Model Ford V8 Station Wagon Automobile, Appellants, vs. United States of America, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Montana.

Filed April 16, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11899

UNITED STATES OF AMERICA,

vs. Libellant,

One 1947 Model Ford V8 Station Wagon Automobile, Motor Number 20 327, bearing Montana 1947 License Number 22-T1307, together with its tools, parts, accessories and appurtenances (Seized from Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo),

Libelees.

APPELLANTS' DESIGNATION FOR
PRINTING RECORD

Appellants herein hereby designate the entire record as certified by the Clerk of the United States District Court to be printed by the above entitled Court, and declare that it is the record relied upon by appellants herein on this appeal.

Dated this 27th day of April, 1948.

/s/ MERLE GROENE,

Attorney for Libelees and Appellants Ermelindo Escobedo and Leo Escobedo.

Service of the within admitted and a copy had this 27th day of April, 1948.

/s/ JOHN B. TANSIL,

United States Attorney,

By /s/ FRANKLIN A. LAMB,

Asst. U. S. Atty.

[Endorsed]: Filed April 29, 1948.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON THIS APPEAL

That the District Court erred in rendering judgment against libelees and appellants Ermelindo Escobedo and Leo Escobedo in that there is not sufficient evidence to justify the findings or judgment, and the order, decision and judgment are not supported by the evidence and are contrary to law in the following particulars:

1. That there is no evidence in the record to support a finding by the Court that appellants, or either of them, had any knowledge whatsoever that the automobile in question contained any wine at the time it entered the Indian Reservation;
2. That appellant, Ermelindo Escobedo, being the owner of the car in question, and being wholly without any knowledge or notice whatsoever of the presence of wine in the said automobile when it entered the Indian Reservation, had no intent to violate any law of the United States, and the forfeiture of his automobile is contrary to law and equity;
3. That the order, decision and judgment is contrary to the evidence herein;

4. That the order, decision and judgment is contrary to law and the principles of equity.

Respectfully submitted,

/s/ MERLE GROENE,

Attorney for Libelees and Appellants Ermelindo
Escobedo and Leo Escobedo.

Service of the within admitted and a copy had
this 27th day of April, 1948.

/s/ JOHN B. TANSIL,

United States Attorney.

By /s/ FRANKLIN A. LAMB,

Asst. U. S. Atty.

[Endorsed]: Filed April 29, 1948.

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

One 1947 Model Ford V8 Station Wagon
Automobile, Motor Number 20-327, bear-
ing Montana 1947 License Number 22-
T1307, together with its tools, parts, ac-
cessories and apurtenances (seized from
Ralph Melendrez, Ermelindo Escobedo
and Leo Escobedo),

Appellants.

Brief of Appellants

Upon Appeal from the District Court of the United
States for the District of Montana

Merle C. Groene, Billings, Montana,
Attorney for Appellants.

Filed, 1948

JUN 30 1948

....., Clerk



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United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

One 1947 Model Ford V8 Station Wagon
Automobile, Motor Number 20-327, bear-
ing Montana 1947 License Number 22-
T1307, together with its tools, parts, ac-
cessories and appurtenances (seized from
Ralph Melendrez, Ermelindo Escobedo
and Leo Escobedo),

Appellants.

Brief of Appellants

**Upon Appeal from the District Court of the United
States for the District of Montana**

Merle C. Groene, Billings, Montana,
Attorney for Appellants.

United States Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

vs.

One 1947 Model Ford V8 Station Wagon Automobile, Motor Number 20-327, bearing Montana 1947 License Number 22-T1307, together with its tools, parts, accessories and apurtenances (seized from Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo),

Appellants.

BRIEF OF APPELLANTS

STATEMENT OF PLEADINGS AND FACTS

This is a proceeding brought by the United States of America, as Libelant, against one 1947 Model Ford V8 Station Wagon, seized from Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo, Libelees. Hereafter the Station Wagon will be referred to as the automobile, Ralph Melendrez as the passenger, Ermelindo Escobedo as the owner, and Leo Escobedo as the driver.

The Libel of Information (R. P. 2), after setting forth the sovereign capacity of the Government, alleges the seizure of the automobile on the Crow Indian Reservation; that prior to the seizure, that the

passenger, the owner and driver had introduced and conveyed into the Crow Indian Reservation a quantity of wine; that at the time of the seizure all three were in possession of said wine. The prayer is for the forfeiture of said automobile.

In connection with said seizure all three were arrested and charged with introducing into and possession of liquor on the Crow Indian Reservation. Information (R. p. 7).

In the forfeiture proceedings an answer (R. p. 9) was filed on behalf of the owner and the driver and a lien claimant. The answer denies that the owner and the driver had introduced or conveyed into the Reservation wine, as alleged; admitted that upon search of the automobile some wine was found in the possession of the passenger, but denied that the automobile was used for the purpose of introducing or conveying said wine into the Indian Country. Further answering, the owner and driver alleged that at the time of the seizure, passenger was a guest in the automobile, was not driving the same and had no dominion over the same; that at no time preceding the seizure, nor at the time of the seizure, did the owner or driver or lien claimant have any knowledge or notice that the passenger had carried wine into the automobile or that it contained any wine.

A reply (R. p. 11) was filed by the Government, denying the allegations of the answer. Thereafter, the passenger entered a plea of guilty to the Information

(R. p. 13). Thereafter, it was stipulated that the evidence in the criminal proceedings against the owner and the driver should be considered as the evidence in the forfeiture proceedings. (R. p. 50-55) Thereafter, the owner and driver were duly tried before a jury on the criminal charge and the jury duly returned a verdict of Not Guilty (R. p. 49).

The evidence of the Government consisted of the testimony of a Government agent (R. p. 13), a policeman (R. p. 22), and another.

Evidence for the prosecution simply showed that after the seizure of the automobile, the Government agent found some wine in paper sacks in the back seat, clear in the back (R. p. 17). The automobile was a station wagon with three rows of seats, with doors for each seat at the side (R. p. 15). The place of seizure was on the Indian Reservation (R. p. 17).

Before the automobile left Hardin, Government agent and the policeman both testified as to certain facts, but they disputed each other. The agent claimed he saw the passenger, one Robinson, and the driver come out of the Stockman, and the passenger was carrying two parcels and driver one or two small packages (R. p. 20). The packages passenger carried might have been something else besides wine (R. p. 21). When the seizure was made the automobile contained other packages, groceries and other stuff (R. p. 21). The policeman said that the three who came out of the Stockman were Robinson and two Escobedos, and testified

differently as to packages and who carried them (R. p. 24).

For defendants, owner and driver, the passenger testified that he bought three half-gallons of wine at the State Liquor Store and put it in the automobile on the floor in the back seat. Later, he met Robinson and one Autobee, and he got a bottle of wine and took it into the Farm Cafe where the three drank some of it. After they finished he put the wine bottle back in the automobile in the back seat on the floor (R. p. 29). Anyone getting into the driver's seat could not readily see the wine. In the back seat his children were sleeping and they had their packages in there with the wine (R. p. 30). He took it upon himself to put the wine in the automobile and did it without permission of the owner and without his knowledge (R. p. 30). He said nothing to the driver and as far as witness knew neither the owner nor the driver had any knowledge or any reason to suspect that there was wine in the automobile (R. p. 31).

Appellants, owner and driver here, testified positively that they knew nothing of any wine being in the automobile. The driver stated that he did not put any wine in the car but he did put in a sack of apples and a carton of cigarettes. When the car was stopped and the officers asked if they had any liquor in the car he told them he didn't have any and he had no reason to think otherwise (R. p. 43). The owner testified that he did not know there was any wine in the car until

the government agent picked it up, that no one had told him the wine was there, and he had no reason to believe it was there; that he put no wine in the car and he saw no one put the wine in the car (R. p. 44). Other evidence was introduced by witnesses for the driver and the owner.

Manuel Melendrez was in the front seat of the automobile; the owner, witness and driver all being in the first seat. He had no reason to suspect that any bottles were in the automobile (R. p. 40).

This, in substance, presents the salient points of the testimony, except that as will hereafter be noted. The lower Court mistakenly assumed that the cross-examination of the passenger indicated that he had the wine with him when he walked down to the automobile with the owner. In the decision the lower Court overlooked entirely the fact that the passenger testified on direct examination: "After we finished with the wine I put the wine bottle back in the car, in the back seat on the floor" (R. p. 29).

SPECIFICATION OF ERRORS

Appellants make the following specification of errors as contained in the statement of points upon which they intend to rely on this appeal as follows:

(R. p. 59) "That the District Court erred in rendering judgment against libelees and appellants Ermelindo Escobedo and Leo Escobedo in that there is not sufficient evidence to justify the findings or judgment, and the order, decision and judgment are not supported by the evidence and

are contrary to law in the following particulars:

1. That there is no evidence in the record to support a finding by the Court that appellants, or either of them, had any knowledge whatsoever that the automobile in question contained any wine at the time it entered the Indian Reservation;
2. That appellant, Ermelindo Escobedo, being the owner of the car in question, and being wholly without any knowledge or notice whatsoever of the presence of wine in the said automobile when it entered the Indian Reservation, had no intent to violate any law of the United States, and the forfeiture of his automobile is contrary to law and equity;
3. That the order, decision and judgment is contrary to the evidence herein;
4. That the order, decision and judgment is contrary to law and the principles of equity."

ARGUMENT

For the purpose of presenting this matter to the Court we propose to address our argument in two parts, first, as to Point No. 1, and second, with reference to Points 2, 3 and 4.

SPECIFICATION NO. I

It is respectfully submitted that there is no legal evidence in the record connecting the owner or the driver with knowledge or notice that when the automobile left Hardin, or when it was seized, that there was wine in it.

It is true the lower Court made certain observations and findings which, with all sincerity, we respectfully submit are not supported anywhere by the record.

Most assuredly a forfeiture cannot be supported by surmise or conjecture and any conclusion as to facts must be based upon and sustained by a preponderance of the testimony, tested by legal rule.

Let us review some of these findings:

In its decision the lower Court said:

“On the subject of knowledge on the part of the owner of the car the Government relies strongly on the testimony of Melendrez and Autobee developing circumstances showing that while the former was carrying the jug of wine back to the car the owner was with him, and could have seen the wine placed in the car; and, since they, the owner and Melendrez, had been drinking together at the Arcade bar, and were both going together towards the car with the latter carrying the jug of wine from which the contents had been nearly emptied, the responsibility was in the senior Escobedo to know whether the wine was in the car; he must have seen Melendrez carrying it towards the car; . . . Melendrez had already pleaded guilty to the criminal charge when he was called as a witness on behalf of the Escobedos, and the testimony relating to the walk to the car with the wine was developed by the District Attorney on cross-examination. This court is of the opinion that the testimony of Melendrez and Autobee in regard to the wine drinking in the cafe . . . brings the senior Escobedo in close contact with the jug of wine, etc.” (R. p. 50-51)

We respectfully submit that the learned Trial Court had no right whatever to make such findings, if findings they are, because it was, first, the duty of the Government to prove the allegations of the libel by a preponderance of the testimony, and, second, there is no evidence to justify such statements.

We dislike reiteration, but we feel this Court ought to be fully informed as to the evidence. The Melendrez referred to in the lower Court's opinion was the passenger referred to by us. On direct examination he stated positively that after drinking some wine in the cafe, he put the bottle back in the automobile in the back seat on the floor. (R. p. 29)

On cross-examination he did testify that he and Autobee came out of the cafe and waited about ten minutes, then saw the owner and went over to the Arcade Bar with him. There is absolutely nothing in his cross-examination, or that of Autobee, even remotely tending to prove that the passenger had the remains of the jug of wine with him when they went to the Arcade. If we can say that his statements that he didn't do anything else once they stepped out of the cafe, except to go to the Arcade, coupled with his direct examination, operates as legal proof that he was carrying the jug of wine all around, then there is some justification for the Court's remarks, but we do not believe such to be the law.

Here we have on direct examination a positive statement that he did put the wine back in the car before he met the owner (R. p. 29), then on cross-examination witness stated that he took the wine into the cafe and remained with some other fellows about an hour and a half (R. p. 33), and then stated that he had been in the cafe all the time up until he saw the owner coming from the Stockman Bar (R. p. 33). We then are con-

fronted with a positive statement that he did put the wine back in the car and a presumption that arises from his testimony on cross-examination that because the didn' do anything else he must have had the jug of wine with him. We respectfully submit there is no legal evidence here sufficient to sustain the burden resting upon the Government to prove its case by a preponderance of the testimony.

20 Am. Jur., 1101.

Of course, the lower Court finally decided that the decision of this Court in *U. S. v. One Chevrolet Coupe*, 58 Fed. 2, 235, compelled it to order a decree of forfeiture of the automobile, and as to this we shall discuss that case later on in this brief. The facts, however, are such that there is no legal evidence to establish knowledge or notice on the part of the owner or the driver. The jury found them innocent of the criminal charge. The libel charges the owner and the driver with wilfully, wrongfully and unlawfully introducing and conveying into the Indian Reservation wine by means of said automobile and that they were in possession of the wine in said automobile (R. p. 4), and, as we have heretofore shown, and as we shall hereafter argue, the Government failed entirely to prove its case against them.

SPECIFICATIONS NOS. II, III AND IV

And so we now come to a consideration of specifications II, III and IV on the premise, as we have here-

tofore shown, that the Government failed to establish by a preponderance of the testimony, or any legal evidence whatever that appellants, owner and driver, introduced into the Reservation, or had in their possession any wine.

This brings us squarely to a consideration of the decision of this Court in *U. S. v. One Chevrolet Coupe*, 58 Fed. (2) 235. Does this decision compel an adverse finding against appellants? We think not.

This case was cited by the lower Court as conclusive and compelling it to declare the forfeiture. In order that we may be able to present our position properly before this Court we state that in that case the facts disclosed that the car was being driven by a bailee of the owner. This is important as it fits exactly into our theory for the knowledge of the agent in that case as to liquor being in the car was the knowledge of the principal.

It is true this Court in that decision indicated that under the amendment to Sec. 246, Tit. 25 USCA, a seizure and forfeiture of an automobile, regardless of the innocence of the owner, was justified. However, we respectfully submit this Court did not hold and will never hold that a forfeiture will be ordered in the following type of cases:

1. An automobile, driverless, containing a bottle of whiskey, is parked on a hill adjoining an Indian Reservation. The brakes loosen and the car runs down the hill upon the Reservation;

2. A car is stolen and the thieves put liquor in it and drive it onto the Indian Reservation.

We have carefully gone into this decision and the cases cited in support thereof, and among the cases cited we invoke the following language from *Shawnee Nat. Bank v. U. S.*, 249 Fed. 583:

“As we have said before, the statute is highly penal, and not in aid of the revenues. It must be, therefore, strictly construed, and all doubts resolved in favor of those against whom it is invoked.”

In all of the cases that are cited in that decision we fail to find any case where a forfeiture was declared, excepting and unless there was a privity between the owner and the one driving the car.

In *U. S. v. One Buick*, 244 Fed., 961, the Court said:

“By the terms of his mortgage he intrusted the possession of the automobile to his mortgagor Latta.”

In *Commercial Inv. Trust v. U. S.*, 261 Fed., 330, the Court said:

“Although it is presented in the interplea, plaintiff in error does not discuss the question as to whether or not the 1917 provision extends to the property of an innocent person; that is, a person not connected with the act of unlawful introduction.”

In that case the plaintiff in error held a conditional sale contract on the car, again evidencing a privity between the owner and the party driving the car.

In *U. S. v. One Seven-Passenger Paige Car*, 259 Fed., 641, the Court again had a case wherein a lien

claimant was involved, again a case of privity between the owner and the one driving, and from this case we desire to quote at length since the history of Section 247, Title 25, USCA, is admirably set forth therein:

“The Congress, on March 2, 1917, enacted the following provision (Indian Appropriation Act, 39 Stat. L. 970 (Comp. St. 1918, Section 4141a):

‘That automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into Indian country, or where the introduction is prohibited by treaty or federal statute, **whether used by the owner thereof or other person** (bold face mine), shall be subject to the seizure, libel, and forfeiture provided in section twenty-one hundred and forty of the Revised Statutes of the United States.’

“In *Shawnee National Bank v. United States*, supra, the Court in passing on a libel begun before the passage of the act of March 2, 1917, referred to said provision in haec verba:

‘The enactment of this law by Congress was a legislative declaration that in the opinion of Congress section 2140, as it read when the seizure in this case was made, did not authorize the seizure and forfeiture of any of the articles mentioned in section 2140, except those owned by the guilty party.’

“Libelant contends that this is a proceeding in rem, and that the guilty thing is the offender, and that this is to be forfeited irrespective of intervening leinholders. The mortgage stipulates that the mortgagor shall not remove or permit the removal of said property from the county of Oklahoma, and tha said mortgagor shall not secretly run off, remove, or conceal, nor attempt to run off, remove or conceal, any of said property, nor permit such an act to be done, and in case said mortgagor shall violate or commit a breach of any

of said conditions the mortgagee may declare the mortgage debt due and immediately take possession. It will here be taken as true that the automobile was taken out of Oklahoma county and into the Eastern district of Oklahoma without the consent or connivance of the mortgagee. However, this is no barrier to forfeiture if the statute imposes it. The statute being highly penal, and not in aid of the revenues, it must be strictly construed, and doubts resolved in favor of those against whom it is invoked. No person or case will be held within its terms unless clearly within its letter and legislative intent. A search of the Compriation Act of March 2, 1917, was offered after the bill had passed the House and was being considered by theenate in committee of the whole. On page 2052, volume 54, of the Congressional Record, it appears that the fifth amendment thereto was to insert on page 4, line 13, after \$150,00, the following:

‘Provided, that automobiles or any other vehicles or conveyances used in introducing intoxicants **into the Indian country in violation of law, whether used by the owner thereof or other person**, shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States.’

“The bill as thus amended went to conference (pages 2931 and 2970, volume 54), and the first report provided that, in lieu of Senate Amendment No. 5 (which was the amendment quoted above), the following amendment be inserted:

‘Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants **into the Indian Country, where the introduction is prohibited by treaty or federal statute**, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States.’

“This report was again referred for conference.

In the second conference report (pages 3808 and 3811, volume 54) it was provided that in lieu of Senate Amendment No. 5, which has heretofore been set out, the following amendment be substituted:

‘Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, **or** where the introduction is prohibited by treaty, or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States.’

“The development of this legislation indicates that this provision was enacted with especial reference to conditions existing in Eastern Oklahoma. The introduction of intoxicating liquors from without the state into that part which was formerly Indian Territory being prohibited by act of Congress, and the manufacture, sale, and transportation of such liquors between points within the state being also prohibited by provision of the state Constitution, the rapid growth of cities and industrial and mining centers and general increase in population in said part of the state necessitated the utmost vigilance, fidelity, and efficiency among law enforcers. When section 2140 was first enacted in 1864, the usual mode of travel through the Indian country, frontier settlements, and remote regions was by means of stagecoach, freight wagon, steamboat, and sled. The carrying in such conveyance of intoxicating liquors by a passenger without the consent of its owner then did not work a forfeiture of the conveyance. With the coming of the automobile and its full development different conditions arose. Transportation by express or railroad being practically closed by law and the vigilance of the officers, the introducer and the illicit handler of intoxicants resorted to the automobile as an easy facility for carrying on such prohibited introduction and illicit traffic. If such

law violators may encumber such automobiles so as to minimize the actual investment of such introducer the financial hazard of the business is thus reduced. Hence the reason for the terms of the act to include not only automobiles but also to exclude the innocent lienholder from any protection in such forfeiture. See, also, Oklahoma Sessions Laws 1917, chapter 188; *United States v. Birdsall*, 233 U. S. 223, 34 Sup. Ct. 512, 58 L. Ed. 930."

This appeal is not being prosecuted by the libelee lien claimant for we believe that under the decision in question where there is privity between the driver of the car and the owner that the owner cannot escape forfeiture of the automobile on the ground that he, himself, did not know that his agent, or the one in privity with him, was using the automobile to introduce liquor into the Indian country. However, on behalf of the appellants, where the owner and driver of the car, having no knowledge or reason to suspect that wine was in the car, we respectfully submit the decision in *U. . v. One Chevrolet Coupe*, *supra*, does not apply.

In *U. S. vs. One Buick Sedan*, 64 Fed. Supp. 905, the Court said:

"Possession of intoxicating liquors in (Indian) country appears to be the criterion that is most controlling here.

Harris vs. U. S., 8 Cir. 249 L. 41.

Custer vs. Louis, 8 Cir. 254 F. 917.

Brown vs. U. S., 8 Cir. 265 F. 623."

Referring back to the statutory charging words "used in introducing," we respectfully submit that the word "introduce" compels by its very definition

some intention to act on the part of the driver of the automobile. For instance, in the New Century Dictionary, "introduce" is defined as "to lead, bring, or put into a place, position . . . etc., and . . ."

That this is right is borne out by the language of the Supreme Court of the United States in **Goldsmith, Jr.,-Grant Co. v. United States**, 65 L. Ed., page 379, and there the Court said:

"It is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it. Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made, it will be time enough to pronounce upon it. **And we also reserve opinion as to whether the section can be extended to property stolen from the owner, or otherwise taken from him without his privity or consent.**"

See, also, **U. S. v. 1 Ford Coupe**, 71 L. Ed. 321.

Likewise, the State of California has forfeiture laws just as strict as the Federal Laws, and there the Court uses the following language:

"**'An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law, but, in the operation of an automobile without the owner's consent to do so in any manner at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner.'** That reasoning is directly applicable here. The extent of the implied limitation on the operation

of the statute is that an owner's interest cannot be forfeited if the car has been taken without the owner's consent, but if that consent is given the fact that the bailee violates restrictions as to either time or place of use is an immaterial factor."

People v. One 1941 Chrysler, etc.
162 Pac. (2d) 653.

The word "introduce" is synonymous with the word "carry."

U. S. v. Buckles, 97 S.W. 1022.

Intoxicating liquors are introduced . . . when the liquors have been **INTENTIONALLY TRANSPORTED**.

Reynolds v. State (Ariz.) 161 Pac. 885.

The word "used" is an active, transitive verb, **AND INVOLVES IN ITS DEFINITION SOME ACTION OR PURPOSE ON THE PART OF THE PERSON USING THE VEHICLE.**

Tuttle v. State (Ga.) 110 S.E. 455.

Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others.

Rice v. Frayser, 24 Fed. 460.

Williams v. Buchanan (N.C.) 35 Am. Dec. 760.

In a liquor prosecution, wherein defendant claimed that he knew nothing of liquor being on his premises, defendant held entitled to instruction that, if liquor was on premises, without his authority, knowledge or consent, he was not in unlawful "possession" of liquor and should be acquitted.

Mullins v. Commonwealth (Ky.) 295 S.W. 987.

Keifner v. Commonwealth (Ky.) 7 S.W. (2) 1066.

"Under this rule if the property used for an unlawful purpose was intrusted by the owner to the person who, without the owner's knowledge used it for an unlawful purpose, the innocence of the owner will not prevent a forfeiture, but if the

property was taken from the owner without his permission or consent and used by the taker for an unlawful purpose it cannot be forfeited therefor.”

27 CJS 14.

and cases cited.

Analagous to the situation here let us call the Court's attention to the case of *Bring v. U. S.*, 6th Cir. 148 Fed. (2) 325. In this case, the Court had under consideration the statute with reference to a wholesaler failing to keep records and held that the failure to keep records must be wilful and intentional, and the Court says:

“The Federal Alcohol Administration Act, 27 U.S.C.A., Section 201 et seq. together with 26 U.S.C.A. Int. Rev. Code, Section 2800 et seq., constitute a comprehensive scheme for the regulation and taxation of all transactions in distilled spirits, various provisions of the latter being in the nature of a revision of earlier statutes in force prior to the outlawing of liquor by the Eighteenth Amendment to the National Prohibition Law. In view of their nature and purpose their provisions do not speak in terms so prohibitively absolute as, in an enactment which penalized a traffic currently conceived to be inimical to public and private morality, were deemed to be appropriate. So when Section 2857 provides penalties to be imposed upon a wholesale liquor dealer ‘who refuses or neglects to keep such records in the form prescribed by the Commissioner,’ failure to comply must be wilful and intentional. **Arrow Distilleries v. Alexander**, 7 Cir., 109 F. 2d 397, 406; **United States v. Monarch Distributing Co.**, 7 Cir., 116 F. 2d 11, 13. It is a construction warranted by the language used, the scope and intent of the enactment, and the fact that it no longer expresses a national policy to control appetite by law.”

If we have failed to make our client's position clear to the Court, it will be due more to our inability to formulate a proper Brief than our sincere conviction that, in this case, the Court should dismiss the forfeiture proceedings. If a person may steal an automobile and take it upon the highways and surreptitiously have liquor in it so that the automobile is subjected to forfeiture; if some stranger puts liquor in an automobile so that, without the knowledge of the owner, or his participation, the car is seized and forfeiture insisted upon; if this is the case, then we respectfully submit that such a procedure is violative of the 5th Amendment to the Federal Constitution.

We have been able to find only two cases which seem to be on all-fours with this. Judge Clark in analyzing the decision of this Court of the U. S. v. One Chevrolet Coupe, 58 F. 2d, 235, made the following observations:

“My attention is called to the wording in the opinion of the Ninth Circuit Court of Appeals in *United States v. One Chevrolet Coupe Automobile*, supra, as follows: ‘Appellant says, if we accept the contention of the appellant, **it is the automobile itself that is the offender and it is immaterial what the circumstances are.** This is the theory upon which a forfeiture is predicated.’

“The bold face portion of the opinion is not the words of the Court. The comment of the Court is ‘This is the theory upon which a forfeiture is predicated.’ That does not, in my judgment, bind this Court to the general statement that the car is the offender. It is a general rule but one, like most general rules, which is subject to certain excep-

tions.”

And again on Page 421, Judge Clark said:

“Courts generally have held that when one loans his car to another he assumes liability for the acts of that person in using it contrary to law, but this provides no likeness to the circumstances here. Reedy at most was only a passenger and as said by the District Court of Appeal, Second District, Division 3, California, in the Case of *People v. One 1941 Buick Sport Coupe, etc.*, 166 P. 2d 69, at page 73.

“ ‘On the facts presented by the findings in the instant case, we feel that an innocent owner, in possession of his vehicle, should not be made to suffer the drastic penalty of forfeiture where he has no knowledge, actual or implied, of the unlawful possession of narcotics by one who is riding with him. Although the legislature has not expressly exempted an owner, under such circumstances we feel that a forfeiture should not be permitted for a ‘contrary determination would amount to an unconstitutional deprivation of property without due process of law.’ *People v. One 1941 Ford 7 Stake Truck, supra*, (26 Cal. 2d 503, 159 P. 2d 641). The same principle, i.e., deprivation of property without due process, is as truly involved here as in the case of an owner whose car is stolen from him or who has not consented to the taking or use of his automobile.’

“The Statute on which this decision by the California Court is based is more strongly worded in respect to forfeiture than the statute (Se. 247, Title 25 U.S.C.A.) under which this action is prosecuted, and while it can be said that this provision taken literally includes the automobile used by James Reedy in this case, such a construction is so unreasonable and the resulting forfeiture so unjust it is certain, in my mind, that Congress had no such intention, and if they did so intend then it would be in violation of the due process

clause of the Constitution of the United States. Amend. 14.”

And in the case of U. S. vs. 1 Model H. Farmall Tractor, etc., 51, F. Supp. 603, the Court said:

“The Supreme Court in its latest pronouncements on the subject reversed opinion as to whether this section of the statute can be extended to property stolen from the owner, or otherwise taken from him without privity or consen. **Goldsmith, Jr.-Grant Co. v. United States**, 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376; **United States v. One Ford Coupe Automobile**, 272 U. S. 321, 47 S. Ct. 154, 71 L. Ed. 279, 47 A.L.R. 1025.

“Other courts hold uniformly to a construction which protects the innocent owner of property from forfeiture where the property has been taken by a trespasser, or the owner has been deprived of possession without his knowledge and consent, or through his negligence. **United States v. Almeida**, 1 Cir., 9 F. 2d 15; **United States v. Two Barrels of Whiskey**, 4 Cir., 96 F. 479; **United States v. One Ford Coupe**, D. C. Idaho, 21 F. 2d 639; **United States v. One Buick Roadster**, D. C. Montana, 280 F. 517. See also: **United States v. One Saxon Automobile**, 4 Cir., 257 F. 251; **Beaudry v. United States**, 5 Cir., 79 F. 2d 650, 651.

“(1) Under the accompanying findings of fact, the parties using the tractor at the time of its seizure had obtained same through trespass and without the knowledge and consent of its owners. Nor did the owners negligently contribute to the violation of the internal revenue laws in their control and use of the tractor.

“The libel should be dismissed and the tractor returned to the claimant herein.”

We respectfully submit that the lower Court was in error in the particulars urged and that the forfeiture

of the automobile in question should be dismissed.

Respectfully submitted,

MERLE C. GROENE,

Attorney for Appellants.

No. 11899

United States
Circuit Court of Appeals
for the Ninth Circuit

ERMELINDO ESCOBEDO and LEO ESCOBEDO,
Claimants of One 1947 Model Ford V 8 Station
Wagon Automobile,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

Upon Appeal from the District Court of the United
States for the District of Montana

JOHN B. TANSIL, United States Attorney

FRANKLIN A. LAMB, Assistant United States
Attorney

Attorneys for Appellee

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BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

The statement of facts of the Appellant is accepted except as the same is controverted and extended as more fully set forth in our argument under Specification of Error No. I.

ARGUMENT

As the Appellants have presented their case in two parts, for the purpose of clarity we will do likewise, i.e., first to Specification of Error No. I, and second as to Specifications of Error Nos. II, III and IV.

SPECIFICATION NO. I

It is with reluctance that we are compelled to make a further statement of the facts, but we do not

believe that the Appellants' statement of the Government evidence is presented in its true light and certainly is contrary to the findings of fact made by the Honorable Charles N. Pray, the presiding District Court Judge. (R. p. 49-53).

There was little or no conflict in the evidence offered on behalf of the Libelant and Libelee insofar as the material elements of the case were concerned. The evidence disclosed that that in the course of the evening immediately preceding the search and seizure of said automobile, all of the adult passengers with the exception of the driver had been drinking to quite some extent. (R.p. 29-30-32-33-34-35-36-39-44-45).

The evidence of the Libelant disclosed that the Special Officer of the U. S. Indian Service charged with the suppression of liquor traffic among the Indians and in the Indian country had received in the regular mail an unsigned letter advising that the owner of the automobile had been selling liquor to the Indians, and that the passenger was bootlegging to the Indians. (R.p.22). Acting upon this information, surveillance was undertaken and after observing various occupants of the automobile placing packages in the automobile immediately after leaving a liquor establishment, the officers followed the automobile onto the Indian Reservation where the automobile was searched and the liquor found after its intro-

duction onto the reservation in said automobile. (R. p. 14-25). The District Court in its decision found that these facts gave the officer probable cause upon which to act, and search and seize the automobile involved. (R.p. 53).

The Appellants state in their brief (p. 5) that the lower Court mistakenly assumed that the cross-examination of the passenger Melendrez indicated that he had the wine with him when he walked to the automobile with the owner. While the passenger testified on direct examination that he placed the wine bottle back in the car before meeting the owner (R.p. 29), immediately thereafter on cross-examination he was given adequate opportunity to retrace his steps upon leaving the cafe where he had been drinking, and was asked upon at least four different occasions during the cross-examination whether he did anything upon leaving the cafe until he met the owner of the vehicle. He stated repeatedly that upon leaving the door of the cafe he stood on the sidewalk immediately in front of the cafe until he was joined by the owner and then after drinking together in several bars, went to the car together. (R.p. 33-35). He had previously testified that he and his drinking companions had not completely drunk one jug of wine. (R.p. 29). This partially consumed bottle was found at the time of seizure. Therefore it was clear

that he had this jug in his hand when joined by the owner. (R.p. 33-36). The drinking companion of the passenger Melendrez, upon cross-examination, testified to the identical facts corroborating the testimony given by the passenger upon cross-examination but wholly failing to corroborate the passenger's testimony given upon direct examination. (R.p. 39).

The trial Court on the subject of knowledge on the part of the owner made the following findings of fact, which for the purpose of emphasis and clarity we now quote:

“On the subject of knowledge on the part of the owner of the car, the Government relies strongly on the testimony of Melendrez (the passenger) and Autabee (his drinking companion), developing circumstances showing that while the former was carrying the jug of wine back to the car the owner was with him, and could have seen the wine placed in the car; and since they, the owner and Melendrez, had been drinking together at the Arcade Bar, and were both going together toward the car with the latter carrying the jug of wine from which the contents had been nearly emptied, the responsibility was on the senior Escobedo (the owner) to know whether the wine was in the car; he must have seen Melendrez carrying it toward the car; they were both going to the car to drive away at this time, which was then about 11:00 o'clock at night.” (Words in parenthesis mine).

“Melendrez had already pleaded guilty to the criminal charge when he was called as a witness on behalf of the Escobedos, and the testimony

relating to the walk to the car with the wine was developed by the District Attorney on cross-examination. This court is of the opinion that the testimony of Melendrez and Autobee in regard to the wine drinking in the cafe, with the jug in possession of Melendrez, considered in connection with the surrounding circumstances, taking into account the reiterated positive statements made by Melendrez and Autobee as to what they did, where they went, and who they met, on leaving the cafe, brings the senior Escobedo in close contact with the jug of wine which was returned to the automobile." (R.p. 50-51).

As is often the case, a written transcript of the proceedings in court does not always reveal the true character of the evidence given orally at the trial. However, the lower District Court was the trier of the facts and unless there is a clear abuse of discretion or finding, this court should not reverse these findings, as the District Court had a better opportunity to view the witness on the stand and observe his demeanor when confronted with questions on the cross-examination.

SPECIFICATIONS OF ERROR

NOS. II, III AND IV

(Law Required Forfeiture)

Counsel for Appellants in his brief has discussed the three above specifications of error together, so far the purpose of clarity we will also combine our discussion thereof.

As we view the case the only question presented to

the court under these specifications is whether or not the automobile is subject to forfeiture, the libelees having no knowledge that it contained intoxicating liquor and was used to introduce the same into the Indian country. We must repeat, however, that the Government does not concede that the owner, Ermelindo Escobedo, did not have knowledge that the passenger Ralph Melendrez placed the liquor in the car immediately before its transportation, and if this Court so finds that the owner of the automobile had knowledge of the presence of the intoxicating liquor in the automobile as indicated in our discussion of the evidence under Specification No. I, then there is no material question to be considered and the car should be confiscated.

However, even if the owner had no knowledge that his car was being used to introduce intoxicating liquor into the Indian country, it may be seized and forfeited under the authority of the **United States v. One Chevrolet Coupe Automobile (C.C.A. 9th Circuit, May 6, 1932.)**, 58 Fed. (2d) 235.

In that case heard by this court, the owner of the automobile was entirely innocent of any knowledge of its use by its temporary bailees for the purpose of introducing liquor into the Indian country. The Honorable Curtis D. Wilbur, the Senior Judge of this court, stated on page 236:

“That the sole question involved in the appeal is whether or not an automobile so used for such unlawful purpose is subject to forfeiture regardless of the fact that the owner was innocent of any participation in or knowledge of the illegal use of his automobile. The question is not a new one.

“Under the original form of the legislation enacted in 1864 (13 Stat. 29) for the forfeiture of vehicles used in unlawfully introducing intoxicating liquor into the Indian country (Rev. St. § 2140, now 25 USCA § 246), it was held that it did not authorize the forfeiture of an automobile or the interest of an innocent owner in the vehicle so used. In 1917 the law was amended by adding the provisions now found in 25 USCA § 247, 39 Stat. 970, as follows:

§ 247. Vehicles subject to seizure whether used by owner or other persons. Automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or Federal statute, whether used by the owner thereof or other persons, shall be subject to the seizure, libel, and forfeiture provided in the preceding section.

“In this amendment the clause, ‘whether used by the owner thereof or other person,’ was introduced for the first time, and the courts have since held that this clause was added for the express purpose of requiring the seizure and forfeiture of an automobile, regardless of the innocence of its owner. See *U.S. v. One Automobile* (D.C.) 237 F. 891; *Shawnee Nat. Bank v. U. S.* (C.C.A.) 249 F. 583; *U. S. v. One Buick Roadster Automobile* (D.C.) 244 F. 961; *Hawley v. U. S.* (C.C.A.) 15 F. (2d) 621; *Commercial Investment Trust v. U. S.* (C.C.A.) 261 F. 330;

U. S. v. One Seven-Passenger Paige Car (D.C.) 259 F. 641; U. S. v. One Chevrolet Four-Door Sedan Automobile (D.C.) 41 F. (2d) 782. With this conclusion we agree.”

The cases cited by Judge Wilbur and listed in the fore-going paragraph carefully analyze the development of the law in the United States resulting in the Congress of the United States amending Revised Statute 2140, now U.S.C.A. 246, by the passage of the Indian Appropriation Act approved March 2, 1917, now found in 25 U.S.C.A. 247, 39 Stat. 970. The Circuit Court of Appeals in an Oklahoma case, **Commercial Investment Trust v. United States**, 261 Fed. 300, said:

“Paragraph IV of the Act of March 2, 1917, under which this proceeding is brought, contains following provision: “‘Whether used by the owner thereof or other persons’ It is very evident that it was the intent of Congress to extend the power of seizure, libel and forfeiture beyond the old section of the statute. This Act of Congress authorizes a proceeding against the property so used itself. The offense attaches to the property; the property being the offender, in that it is the means of violating the law.”

The District Court of Oklahoma, in **United States vs. One Seven-Passenger Paige Car**, 259 Fed. 641, also cited above, after carefully analyzing the history and development of the pertinent statutes and the amendments thereto, said:

“It appears to have been the intention of Con-

gress that automobiles or any other vehicle or conveyance used in introducing or attempting to introduce intoxicants into the the Indian country, or where the introduction is prohibited by treaty or Federal statute, should be subject to seizure, libel and forfeiture, without regard to ownership.”

This court quoted with approval from **United States v. One Buick Roadster Automobile**, 244 Fed. 961. See also **United States vs. One Chevrolet Four-Door Sedan, etc.**, 41 Fed. (2d) 782, where the court said:

“By such special acts Congress sought to protect the dependent Indian wards of the government against the evils of intoxicating liquors, and enacted laws to prevent the sale, barter, possession, introduction, or manufacture of such intoxicants in what was designated as Indian country. An effective means to prevent the introduction of intoxicants was to provide for the forfeiture of the vehicles employed for such purposes, without regard to the ownership or claims of persons to the automobile or vehicle. Strict measures were adopted by Congress with respect to the Indians and intoxicating liquors, and, under such statutes, forfeitures of automobiles and vehicles may be had without regard to the ownership or claims of persons to such vehicle.”

Also see **Hawley v. United States**, 15 Fed. (2d) 621.

Counsel for Appellant on page 16 of his brief cited **United States v. One Ford Coupe**, 71 L.Ed.321, 272 U.S. 321. A reading of this case discloses that a similar suggestion was made to the United States Supreme Court, questioning whether there might be

a forfeiture where a stranger has surreptitiously deposited or concealed the liquor in the vehicle while in the possession and use of the owner, or had obtained possession and use of the owner, or had obtained possession of the vehicle by theft and then made use of it. The Supreme Court there said:

“But we are not here concerned with such a state of facts and therefore may dismiss the suggestion by repeating what was said of like possibilities pressed on our attention in the *Goldsmith, Jr., Grant Co. v. United States*, 65 L. Ed. 379: ‘Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it. And we also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent.’”

See also **Thomas S. Dobbins v. United States**, 24 L. Ed. 647, 96 U.S. 395.

Much of the argument offered by Appellants' counsel is founded upon the same theories discussed in the *Goldsmith* and *One Ford Coupe* cases, *supra*. We are not here concerned with the enforcement of the Internal Revenue Code, as considered in appellants' case, **Brink vs. United States**, 148 Fed. (2d) 325, nor in the case of **United States vs. One Model H Farmall Tractor, etc.**, 51 F. Sup. 603, as a reading of that case discloses that the tractor in question had

been stolen from the owner by a trespasser and was illegally used by the trespasser while the owner was asleep. This case certainly has no application here, nor has the quotation from **Goldsmith, Jr.,-Grant Co. vs. United States, 95 L. Ed. 379**, concerning the presence of liquor in a railroad Pullman car that could not be easily examined by the owner before entry into the Indian country. The citation of **People vs. One 1941 Chrysler, 162 Pac. (2d) 653**, concerns only the bailee of a motor vehicle where the owner was not present, and is not applicable to the case at bar.

We are here concerned with one member of a joint adventure placing intoxicating liquor in an automobile when there was a definite duty upon the owner to either search the automobile or question its occupants to determine the presence of intoxicating liquor before driving into the Indian country.

Throughout the Appellants' brief an attempt has been made to distinguish the case at bar from all of the cited cases upon the theory that it must be shown by the Government that the owner or operator of the automobile must have had knowledge of the transportation of the intoxicating liquor into the Indian country and that it is impossible for the automobile to be the offender. We believe that this theory on the part of the Appellants was sound when Section 2140 was first enacted in 1864, but thereafter with the improvement of the means of trans-

portation and the resulting difficulties in law enforcement, Congress saw fit to place a very definite duty upon the owner or operator of an automobile and almost without exception have held that if liquor is found in the automobile, the same is the offender and must be forfeited to the Government. If this court was to adopt the theory of the Appellants herein, it would then be necessary for the enforcement officers to witness almost every act of the owner and operator as well as the acts of the passengers in the automobile in order to enable them to refute the attempts by the owners to have the passengers claim the ownership of liquor found in automobiles used in the introduction of the same into the Indian country. This would be a burden which we do not feel the court would be warranted in placing upon the law enforcement officer. We believe, instead, that Congress intended to place a duty upon the owner or operator to determine the presence or absence of intoxicating liquor in his automobile before entering into the Indian country. This duty can be more fairly assumed by the operators of motor vehicles than the burden which would be placed upon law enforcement officers if the Appellants' theory herein was accepted.

The evidence discloses in the case at bar that the passenger Ralph Melendrez and the owner and operator of the car were engaged in a joint adventure

when they went to the city of Hardin, (R.p. 29, 30, 44) and we respectfully assert that it was the duty of the owner of the motor vehicle to investigate the interior of the automobile, or at least interrogate the passengers therein before driving into the Indian country, particularly where the owner knew that all of the occupants, with the exception of the driver, had been drinking for a period of several hours and that the resulting acts of the passengers might well be an attempt to carry liquor with them upon their return into the Indian country. (R.p. 44-45).

The court's attention has been directed to **United States v. One Ford Two-Door Sedan, etc., 69 F. Sup. 417**, decided by Judge Clark in the District Court, in and for the District of Idaho. This case is clearly distinguishable from the case at bar as the facts there disclosed that the owner of the vehicle had picked up a hitchhiker who subsequently purchased intoxicants and placed the same in the automobile without the operator's knowledge. As Judge Clark there stated, the court was then dealing with the property rights of an Indian and a ward of the United States Government, and it is very apparent that Judge Clark differentiated that case from all others for the purpose of protecting property rights of an Indian ward.

The case at bar can be distinguished from the

Idaho case in several particulars: (1) We are not here dealing with an Indian ward of the United State; (2) The facts here disclose knowledge on the part of the owner of the presence of intoxicants in the automobile; (R. p. 33-36, 39) (3) A passenger and not a hitchhiker placed the intoxicants in the automobile; (R. p. 29) (4) The owner and passenger were engaged in a joint adventure at the time of the introduction of the intoxicants into the Indian country; (R. p. 29-36) and, (5) There was a duty upon the owner to investigate the interior of the automobile and interrogate the passengers where the owner knew all of the occupants, with the exception of the driver, had been engaged in a joint drinking party.

Both the presiding Judge in Idaho and the California court (**People vs. One 1941 Buick Sport Coupe, etc. 166 Pac. (2d) 69**), limited their opinions and decisions to cases where an innocent owner had no knowledge, actual or implied, of the unlawful possession of a person riding in a car where there was no concert of action or joint adventure between the operator and passenger. In the case at bar, the owner had knowledge, both actual and implied and the owner and passenger were engaged in a joint adventure, resulting in a definite duty on the part of the owner to use great care and all means within his power to determine the presence of the intoxicating

liquor in the car, before entering onto the Indian Reservation.

CONCLUSION

We therefore respectfully submit that the decision of the lower court is not in error and that the forfeiture of the automobile in question should be sustained, for the following reasons:

1—The owner of the automobile had knowledge, actual and implied, of the presence of intoxicating liquor before driving onto the Indian Reservation.

2—There was a duty upon the owner to interrogate the passengers and examine the interior of the automobile before driving onto the Indian Reservation as the owner the passengers had been drinking together and were engaged in a joint adventure.

3—The applicable statutes require the seizure and forfeiture of the automobile regardless of the innocence of its owner.

Respectfully submitted,

JOHN B. TANSIL

United States Attorney in and for the
District of Montana.

FRANKLIN A. LAMB

Assistant United States Attorney in and
for the District of Montana.

Attorneys for Appellee



